

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE WESTERN DISTRICT OF TEXAS**
3 **AUSTIN DIVISION**

3 VOXER, INC. and VOXER IP LLC,) AU:20-CV-00655-LY
4))
5 Plaintiffs,)
6))
7 v.) AUSTIN, TEXAS
8))
9 META PLATFORMS, INC., f/k/a)
10 FACEBOOK, INC., and INSTAGRAM LLC,)
11))
12 Defendants.) SEPTEMBER 20, 2022

9 *****

10 TRANSCRIPT OF JURY TRIAL

11 VOLUME 7

12 BEFORE THE HONORABLE LEE YEAKEL

13 *****

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09:36:44 1 (Open court, no jury)

09:36:44 2 THE COURT: The record will reflect that the jury is
09:36:47 3 not present in the courtroom. We have a couple of matters to
09:36:51 4 do before we bring the jury back this afternoon.

09:36:55 5 I think that order of play will be I'll take up the
09:37:01 6 Rule 50(b) motions first. After ruling on those, we'll see
09:37:06 7 where we are and then consider the jury charge. Does that work
09:37:13 8 for everybody else?

09:37:15 9 MR. STONE: Yes, Your Honor.

09:37:17 10 MR. SILBERT: Yes, Your Honor.

09:37:17 11 THE COURT: All right. Then I will take up the
09:37:30 12 defendant's motion first. Ms. Anderson?

09:37:41 13 MS. ANDERSON: Good morning, Your Honor.
09:37:43 14 Christa Anderson for Meta.

09:37:45 15 Your Honor, we submitted to the Court a written
09:37:48 16 Rule 50 motion on many issues in this case, and that should be
09:37:52 17 with Your Honor. The only --

09:37:54 18 THE COURT: I'll bet, had I just done this orally
09:37:57 19 earlier in the week, I wouldn't have gotten 20 pages.

09:38:03 20 MS. ANDERSON: Well, you know, more fun, Your Honor.

09:38:06 21 The only item that we would request brief oral
09:38:09 22 argument with the Court on is the issue of willfulness, and
09:38:14 23 that's because the issue would affect the verdict form,
09:38:17 24 Your Honor. The rest we would submit on the papers to the
09:38:19 25 Court.

09:38:19 1 THE COURT: All right.

09:38:21 2 MS. ANDERSON: All right. Your Honor, with respect
09:38:22 3 to Rule 50 and willfulness, the defendants submit this motion
09:38:29 4 to the Court for judgment as a matter of law on willfulness.

09:38:32 5 There are two things required for a finding of
09:38:34 6 willfulness: knowledge of the patents-in-suit and a specific
09:38:39 7 intent to infringe those patents at the time of the challenged
09:38:45 8 conduct, such as in situation where you have an accusation of
09:38:48 9 infringement of the actual patents-in-suit. Neither of those
09:38:53 10 two elements are present in this case. They have not been
09:38:56 11 proven.

09:38:57 12 First, as to the knowledge of patents, we know from
09:38:59 13 Federal Circuit precedent that knowledge of the patent alleged
09:39:02 14 to be willfully infringed is a prerequisite to enhanced
09:39:06 15 damages. That's the *WBIP* case from 2016.

09:39:11 16 As a corollary to that rule, Your Honor, knowledge of
09:39:16 17 other patents in the same portfolio, with some of those being
09:39:21 18 within the same family as the asserted patents, is insufficient
09:39:26 19 to defeat a motion for summary judgment or, as in the case,
09:39:31 20 motion for judgment as matter of law on willfulness. We know
09:39:33 21 that from the *Intell Ventures* case cited to the Court.

09:39:37 22 Another corollary, knowledge of a patent application
09:39:40 23 is sufficient for the same reasons. We have cited to the Court
09:39:44 24 cases like *Maxell* or the *Conopco* case from the Federal Circuit
09:39:49 25 in 1994. We have the *State Industrial* case from 1985 also from

09:39:53 1 the Federal Circuit, and a number of other cases we've cited in
09:39:58 2 our papers, Your Honor.

09:40:00 3 This rule makes sense. Courts recognize that
09:40:05 4 knowledge of a patent portfolio does not provide notice of any
09:40:09 5 future patent application, and knowledge of a patent
09:40:12 6 application can't provide notice of a future patent because
09:40:15 7 there is no guarantee that any patent will ever issue or in
09:40:21 8 what particular claim.

09:40:22 9 In this case Voxer seeks to rely on willfulness
09:40:27 10 evidence that is insufficient as a matter of law under these
09:40:31 11 doctrines. Voxer is pointing to evidence about the 2012
09:40:34 12 discussions. The patents had not even been applied for in
09:40:38 13 2012, not for another more than five years before the first
09:40:42 14 application would show up. Mr. Katis himself admitted he never
09:40:46 15 referenced any specific patent numbers or applications during
09:40:51 16 those discussions.

09:40:52 17 Voxer also points to the 2016 correspondence from
09:40:55 18 Voxer to Facebook. That correspondence does not list the
09:40:59 19 application for the '270 or the '557 patents, much less the
09:41:03 20 patent themselves, because they did not yet exist.

09:41:08 21 Voxer also points to a provisional application from
09:41:10 22 2007. The provisional application contains no claim language
09:41:16 23 whatsoever, certainly not the specific claims at issue in this
09:41:20 24 case that were submitted to the Patent and Trademark Office
09:41:24 25 years after Facebook Live and Instagram Live had launched.

09:41:29 1 There is simply no evidence in this case of awareness
09:41:34 2 of the specific patents-in-suit until suit was filed in 2020.
09:41:39 3 And, under the law, that is insufficient. And we have cited to
09:41:42 4 the Court the *Biedermann* case as well as *Intell*.

09:41:45 5 The evidence presented shows, at most, that notice --
09:41:50 6 that Facebook had notice of certain Voxer patents listed in
09:41:54 7 that 2016 e-mail correspondence, but Plaintiffs have not
09:41:58 8 identified a single case holding that knowledge of other
09:42:01 9 patents in a patent portfolio could arise to the level of
09:42:05 10 substantial evidence to support a jury finding of willfulness.

09:42:10 11 Moving on, Your Honor, to the second element of
09:42:13 12 willfulness, intent. Knowledge of the patent-in-suit is
09:42:16 13 necessary but not sufficient. You also have to show specific
09:42:19 14 intent that often comes in the form of some specific accusation
09:42:23 15 of infringement. We know that from the *Bayer* case, Federal
09:42:26 16 Circuit 2021.

09:42:28 17 There is literally no evidence in this case of
09:42:31 18 specific intent to infringe. And how could there be? The
09:42:35 19 patents did not even exist when Facebook Live and Instagram
09:42:40 20 Live were developed and launched.

09:42:42 21 Therefore, Your Honor, Defendants respectfully move
09:42:45 22 the Court for a judgment as a matter of law on the issue of
09:42:48 23 willfulness in favor of defendants.

09:42:51 24 Thank you, Your Honor.

09:42:51 25 THE COURT: Thank you. I'll hear a response to that

09:42:56 1 argument.

09:42:58 2 MR. STAKE: Thank you, Your Honor. Sam Stake on
09:43:02 3 behalf of Voxer.

09:43:05 4 There is abundant evidence in the trial record
09:43:08 5 showing Defendant Facebook's willful infringement, and their
09:43:12 6 motion for judgment as a matter of law should be denied.

09:43:16 7 As Mr. Katis, Voxer's founder, testified, obtaining
09:43:19 8 strong patents was always core to Voxer's business strategy.
09:43:23 9 In a summary of a patent portfolio that Voxer shared with
09:43:28 10 Facebook in 2016 they stated: Patents and intellectual
09:43:32 11 property have been integral to Voxer since the inception of the
09:43:36 12 company in 2007. That document was shared with Facebook just
09:43:41 13 days and very shortly after the launch of Facebook Live, the
09:43:46 14 accused product in this case. And that document referenced the
09:43:50 15 immediate parents of the two patents-in-suit here.

09:43:56 16 Now, starting in 2010, we saw abundant evidence in
09:44:01 17 the trial record of Voxer and Facebook having a history of
09:44:05 18 discussions -- business discussions. And Facebook took an
09:44:09 19 interest in either acquiring Voxer or in licensing its patented
09:44:14 20 technology.

09:44:16 21 In a series of meetings in early 2012, the evidence
09:44:19 22 that we heard shows that Voxer's founders, Tom Katis and
09:44:24 23 Matt Ranney repeatedly disclosed to Facebook and described in
09:44:29 24 detail the core patented live messaging and storing stream
09:44:33 25 technology. That included video live messaging technology at

09:44:37 1 issue in this case.

09:44:40 2 They further disclosed that Voxer had both issued
09:44:44 3 patents and patent applications. That's what the testimony
09:44:48 4 reflects. Those patents and patent applications have -- have a
09:44:54 5 near identical specification and disclosure as the two patents
09:44:59 6 at issue in this suit.

09:45:03 7 Mr. Katis further testified that at every meeting
09:45:06 8 with Facebook, including in meetings with Facebook CEO
09:45:11 9 Mark Zuckerberg, CTO Mike Schroepfer, and other senior
09:45:15 10 leadership, that he always at every meeting disclosed the
09:45:18 11 patents.

09:45:19 12 Testimony from Facebook witnesses and internal
09:45:23 13 Facebook documents that have been introduced into evidence
09:45:26 14 confirm that Facebook evaluated Voxer's patents and patented
09:45:31 15 technology favorably and that it investigated Voxer's patent
09:45:37 16 portfolio.

09:45:38 17 As Peter Deng testify -- this was on Friday
09:45:41 18 afternoon. He is the director of product and responsible for
09:45:44 19 the messaging applications at Facebook he testified -- pardon
09:45:49 20 me. The transcript from that testimony reflects:

09:45:53 21 "Question: Well, you appear to have written an
09:45:56 22 e-mail from Mr. Deng -- from yourself to Mr. O'Rourke on
09:46:01 23 February 9th, 2012 with the subject 'Voxer patents,' right?"

09:46:04 24 And then Mr. Deng's answer was: "That's what this
09:46:07 25 suggests."

09:46:08 1 And a further question was: "So this suggests that
09:46:11 2 you knew that Voxer had patents in 2012, right?"

09:46:14 3 Answer: "Yeah."

09:46:15 4 And, as Your Honor will remember, there was a lengthy
09:46:18 5 discussion about the contours of privilege and that Facebook
09:46:21 6 had asserted privilege. We're of course not invading those
09:46:27 7 discussions, but this just reflects that it's rare to have
09:46:29 8 evidence of a smoking gun in cases like this.

09:46:32 9 Instead we know that there is ample circumstantial
09:46:35 10 evidence, at a minimum, that Facebook was aware of these patent
09:46:38 11 families and patents and patented technologies for years
09:46:43 12 leading up to this lawsuit.

09:46:46 13 And then what happened next that we heard was that
09:46:50 14 Facebook chose instead to build its infringing messaging
09:46:55 15 platforms rather than license this technology from Voxer. In
09:46:59 16 2016, after Facebook Live and Instagram Live launched, Voxer
09:47:04 17 sent Facebook a detailed patent program and strategy document
09:47:07 18 as well as a summary of Voxer's patent portfolio.

09:47:11 19 Now, this is all -- those are unrebutted facts that
09:47:15 20 show Facebook was aware of Voxer's patents, including patents
09:47:19 21 and patent applications showing the same specifications, same
09:47:23 22 inventors, and same assignee, Voxer, which is what we heard
09:47:27 23 from Ms. Lawton just yesterday. But they chose instead to
09:47:32 24 build its infringing platforms rather than engage Voxer.

09:47:37 25 I mentioned that there are cases that discuss the

09:47:40 1 rarity of smoking gun evidence and instead affirm that
09:47:44 2 circumstantial evidence is sufficient. And these cases
09:47:46 3 specifically address the sufficiency of similar and identical
09:47:54 4 patent specifications in parent applications and parent
09:47:56 5 patents.

09:47:57 6 We have several of these cases and are happy to
09:48:02 7 address those further if Your Honor so wishes. But, for the
09:48:05 8 record they include the Federal Circuit's decision in
09:48:12 9 *Commscope Techs, T-e-c-h-s*, which is a Northern -- pardon me.
09:48:16 10 That's the Northern District of Texas decision at 2020 WL
09:48:21 11 11626079.

09:48:24 12 And in that case, as the Northern District of Texas
09:48:29 13 wrote, "There is also evidence that Dali knew or should have
09:48:32 14 known that its actions infringed the '747 patent," which was
09:48:35 15 the patent-in-suit there, "including that, in 2010, Dali had
09:48:39 16 knowledge of the parent to the '747 patent which shares the
09:48:42 17 same specification, inventor, and assignee as the '747 patent."

09:48:46 18 And then just two more cases for the record. One is
09:48:50 19 a Federal Circuit decision *K-TEC v. Vita-Mix Corp.*, which is
09:48:53 20 696 F.3d 1364. And in that one the Federal Circuit affirmed
09:49:00 21 the sufficiency of a willfulness finding where the infringer
09:49:05 22 had notice of a patent when it issued because the infringer had
09:49:10 23 notice of the patent's parent application and notice of the
09:49:15 24 patent's pending application in affirming a finding of
09:49:16 25 willfulness.

09:49:18 1 And then finally, an Eastern District of Texas case
09:49:21 2 from 2010. This is *Synqor*, S-y-n-q-o-r, v. *Artesyn Techs*,
09:49:28 3 that's A-r-t-e-s-y-n. And that's at 2010, WL 11534393. And
09:49:37 4 there the court wrote: "While plaintiff may not have direct
09:49:41 5 evidence of each Defendant's knowledge of each patent,
09:49:45 6 Plaintiff has established that each defendant was familiar with
09:49:47 7 its products, technologies, and other patents."

09:49:49 8 So those cases confirm that it's rare to have smoking
09:49:52 9 gun evidence, but that the type of evidence we have here, which
09:49:55 10 span a number of years and repeated disclosures to Facebook is
09:49:58 11 sufficient for a reasonable jury to find willful infringement
09:50:02 12 and that Facebook's Rule 50 motion should be denied.

09:50:05 13 Thank you, Your Honor.

09:50:06 14 THE COURT: Ms. Anderson, do you desire to respond?

09:50:08 15 MS. ANDERSON: Very briefly, Your Honor.

09:50:13 16 Christa Anderson for Meta.

09:50:15 17 Your Honor, the testimony that counsel has pointed to
09:50:18 18 all concern discussions before the patents in-suit ever issued.
09:50:24 19 For the reasons I discussed earlier, these are not sufficient
09:50:26 20 to satisfy the standard.

09:50:29 21 What counsel would have the jury do is speculate in
09:50:32 22 the absence of any evidence that, somehow, Facebook and
09:50:34 23 Instagram had internally tracked the patents and forecast and
09:50:39 24 knew that specific patent claim language would issue in the
09:50:42 25 future, and developed Facebook Live and Instagram Live based on

09:50:46 1 unissued patent claims. That is pure speculation, Your Honor,
09:50:50 2 and not permissible under governing law regarding willfulness.

09:50:55 3 With respect to the cases that have been cited by
09:50:57 4 counsel, counsel cited the *Commscope* matter. That case is
09:51:02 5 distinguishable on its facts from this case. In that matter
09:51:06 6 the defendant's CEO testified he actually knew about the
09:51:10 7 patents-in-suit before the lawsuit.

09:51:14 8 The *K-TEC* matter that counsel referenced is also
09:51:19 9 distinguishable. In that matter Plaintiff provided actual
09:51:21 10 notice that defendant's product was infringing a parent patent
09:51:25 11 and actual notice that Defendant's product was infringing the
09:51:29 12 claims of a pending patent which then issued. Those facts are
09:51:32 13 not present in this case.

09:51:35 14 Last, the *Synqor* case to which counsel cited is a
09:51:43 15 very lightly reasoned case. There is not a lot of analysis in
09:51:47 16 that matter. It is difficult to assess what facts were before
09:51:47 17 the court from the opinion itself. But that particular case
09:51:54 18 from 2010 does not warrant departing from settled Federal
09:51:57 19 Circuit precedent governing how willfulness matters should be
09:52:01 20 resolved.

09:52:02 21 Thank you, Your Honor.

09:52:03 22 THE COURT: Thank you.

09:52:07 23 Mr. Stake, Ms. Anderson indicated to the Court that
09:52:12 24 she will rely on the written motion for the other arguments
09:52:16 25 under 50(a). Do you care to be heard on any of those, or do

09:52:22 1 you -- are you comfortable with the court just relying on the
09:52:28 2 written motion in making the court's decision?

09:52:31 3 MR. STAKE: Your Honor, on the other bases for the
09:52:34 4 motion, we would just like to state for the record that those
09:52:37 5 should all be denied. In fact, we moved that, instead,
09:52:45 6 judgment as a matter of law should be entered for infringement
09:52:48 7 and for validity. And we've provided in this morning's papers
09:52:53 8 the evidentiary basis for the converse findings. And we
09:52:57 9 believe that is -- should get us most of the way there.

09:53:02 10 I would just add for the record that we heard
09:53:07 11 detailed element-by-element analysis.

09:53:09 12 THE COURT: I'm going to hear you on your motions, so
09:53:10 13 you don't have to bring those up. I'm just wanting to know if
09:53:13 14 you want -- and if this is argument against her motion, that's
09:53:17 15 fine. But you don't have to argue your motions at this time.

09:53:21 16 MR. STAKE: Okay. Your Honor, nothing else at this
09:53:25 17 time. We believe that the record amply shows the sufficiency
09:53:31 18 of our experts' infringement analyses, validity analyses, ample
09:53:39 19 testimony on the unconventionality of Voxer's patents to defeat
09:53:45 20 the 101 motion, as well as detailed damages analysis by
09:53:50 21 Mr. Ratliff to defeat the damages motions.

09:53:56 22 Your Honor has already denied motions on lack of
09:53:59 23 standing as well as on Section 101. We believe that those
09:54:05 24 issues have been sufficiently briefed for Your Honor, and the
09:54:08 25 same conclusions should stand. And I think we are satisfied

09:54:18 1 with this statement of our position.

09:54:20 2 THE COURT: Thank you. Ms. Anderson, I'll give you
09:54:24 3 another opportunity if you want to say anything about your
09:54:25 4 motion.

09:54:26 5 MS. ANDERSON: Nothing further, Your Honor. Thank
09:54:28 6 you. We submit on our papers. Thank you, Your Honor.

09:54:30 7 THE COURT: All right. The court then at this point
09:54:32 8 has before it Defendant's Motion for Judgment as Matter of Law
09:54:35 9 Under Rule of Civil Procedure 50(a), which I have reviewed at
09:54:42 10 length and entertained argument on, and Section B, that Voxer
09:54:49 11 failed to offer sufficient evidence of willful infringement.

09:54:54 12 I will address that first. I grant that portion of
09:55:00 13 the motion and rule as a matter of law that there is no legally
09:55:11 14 sufficient evidence here of intent to willfully infringe.

09:55:18 15 I believe that discussions and the timeline on this
09:55:24 16 is far too attenuated to submit this issue to the jury. Yes,
09:55:30 17 there were discussions. Yes, there was knowledge on the part
09:55:36 18 of the defendants that there was a patent portfolio out there.
09:55:41 19 I think it is -- it is clear that the patents had not been
09:55:48 20 applied for in 2012 or 2016. They certainly had not been
09:55:53 21 issued. The provisional applications, as has been argued, and
09:55:59 22 that's what the court finds, don't reflect the claims. There's
09:56:03 23 only the most general of evidence out there.

09:56:09 24 Yes, the court recognizes the law, that there is
09:56:12 25 often perhaps never smoking gun evidence of intent to infringe

09:56:19 1 of willfulness, and the court always considers circumstantial
09:56:24 2 evidence in that regard. But I find that this is too weak a
09:56:30 3 circumstantial case to rise to legally sufficient evidence.

09:56:33 4 So I grant the motion as to the issue of willful
09:56:41 5 infringement and will not submit that to the jury.

09:56:44 6 I have gone over each and every of the other points
09:56:53 7 that are made in the defendant's motion, and I find that they
09:57:00 8 fail on those points, that there is adequate evidence in the
09:57:05 9 record where the court cannot say that a reasonable jury would
09:57:11 10 not have a legally sufficient basis to find for Voxer on those
09:57:19 11 issues. So the other issues in the motion are overruled, and
09:57:27 12 the motion is denied as regards to the other parts.

09:57:32 13 Now, let me hear from Voxer on its motions that you
09:57:40 14 divided up. I think there are four separate ones; is that
09:57:43 15 correct? I want to make sure I didn't miss one. You have
09:57:48 16 four; is that correct?

09:57:50 17 MR. STAKE: That's correct, Your Honor.

09:57:51 18 THE COURT: All right. Then why don't you argue them
09:57:53 19 one at a time, but altogether, as opposed to arguing one and
09:57:58 20 then I go to Facebook and then we come back to you. I think
09:58:05 21 it's clear, and I think it would just be easier if you argue
09:58:10 22 your motions together, and then I'll get a response together.

09:58:15 23 MR. STAKE: Your Honor, thank you for the opportunity
09:58:19 24 to be heard. We did -- we do appreciate the honor to submit
09:58:24 25 briefing on these four motions. We are happy to rest on our

09:58:28 1 papers as to those four motions.

09:58:30 2 I think one that I would just highlight is the motion
09:58:33 3 for judgment as a matter of law on validity of the '270 patent.
09:58:37 4 For that patent it was Dr. Bhattacharjee. He did not present
09:58:43 5 any invalidity analysis for that patent and confirmed that he
09:58:49 6 had no invalidity analysis. So we believe that that one is --
09:58:53 7 that that one is appropriate to enter a judgment as a matter of
09:58:57 8 law on at this time.

09:58:59 9 THE COURT: Let me look at that and see if I have any
09:59:03 10 questions.

09:59:16 11 Which one of your four motions does that go to?

09:59:26 12 MR. STAKE: So that is Docket Number 320. It's
09:59:28 13 Voxer's Motion For Judgment as a Matter of Law that the '270 is
09:59:31 14 not Invalid as Anticipated or Obvious.

09:59:33 15 THE COURT: Okay. Thank you. All right. So you
09:59:39 16 rest on your papers on those?

09:59:41 17 MR. STAKE: Yes, Your Honor.

09:59:42 18 THE COURT: All right. Ms. Anderson, do you or
09:59:44 19 anyone at Facebook have a response?

09:59:44 20 MS. ANDERSON: Thank you, Your Honor. Mr. Paige will
09:59:44 21 address that.

09:59:45 22 THE COURT: Mr. Paige does.

09:59:46 23 MR. PAIGE: Thank you, Your Honor. Good morning.
09:59:49 24 Gene Paige on behalf of Meta.

09:59:50 25 Your Honor, with respect to that motion for judgment

09:59:52 1 of law -- as a matter of law, Voxer isn't entitled to a
09:59:58 2 judgment of no invalidity the '270 patent. There's no claim at
10:00:03 3 issue on validity. As Voxer pointed out in the sidebar
10:00:07 4 yesterday, when resisting rebuttal on '557 invalidity, Facebook
10:00:11 5 didn't file a counterclaim for invalidity. So there isn't a
10:00:15 6 claim at issue here. This is a defense to their claim of
10:00:18 7 infringement. And Voxer isn't entitled to anything in the
10:00:24 8 judgment on this. It wasn't a disputed issue at trial, and no
10:00:27 9 evidence was presented one way or another on it.

10:00:29 10 It doesn't change the status quo, because there is a
10:00:37 11 presumption of validity in the first place, one that wasn't
10:00:40 12 addressed at trial. So there is no basis to enter judgment on
10:00:44 13 what is an affirmative defense, not a claim. And if Voxer is
10:00:50 14 somehow entitled to judgment on things that were not presented
10:00:55 15 at trial, were not at issue at trial, then certainly Facebook
10:00:58 16 would be entitled to a judgment of noninfringement of all
10:01:02 17 claims except the asserted claims in the '270 patent. And
10:01:05 18 that's just not the way things are normally done.

10:01:10 19 THE COURT: All right. Anything else?

10:01:12 20 MR. PAIGE: No, Your Honor.

10:01:13 21 THE COURT: Mr. Stake, any response?

10:01:14 22 MR. STAKE: Your Honor, two quick points. First, we
10:01:27 23 believe judgment as a matter of law is appropriate here because
10:01:30 24 a reasonable jury would not have a legally sufficient
10:01:33 25 evidentiary basis to find that any asserted claim of the '270

10:01:36 1 patent is invalid as anticipated or obvious. That's point
10:01:39 2 number one.

10:01:40 3 Point number two is that we understand that Facebook
10:01:44 4 is not seeking to include the invalidity of the '270 patent in
10:01:49 5 the verdict form. So as long as that is the case, that takes
10:01:55 6 care of much of this issue. The jury certainly should not be
10:01:58 7 given an opportunity to reach a verdict on invalidity of this
10:02:03 8 patent.

10:02:10 9 THE COURT: Thank you. All right. I have reviewed
10:02:14 10 the four motions. I'll run through them: Voxer's Motion For
10:02:18 11 Judgment as Matter of Law that the '270 patent is Not Invalid
10:02:22 12 as Anticipated or Obvious; Voxer's Motion For Judgment as a
10:02:26 13 Matter of Law of Infringement of the '270 patent; Voxer's
10:02:33 14 Motion For Judgment as a Matter of Law of Infringement on the
10:02:37 15 '557 Patent; and Voxer's Motion For Judgment as a Matter of Law
10:02:43 16 that the '557 Patent is not Invalid as Anticipated or Obvious.

10:02:48 17 I have gone back through my notes of the trial also,
10:02:55 18 and much as I have found in the major part of the motion that
10:03:03 19 defendants file, I cannot say that a reasonable jury could not
10:03:10 20 have legally sufficient basis to find for Meta on any of the
10:03:16 21 issues raised by the plaintiff. So the plaintiff's motion for
10:03:23 22 judgment as matter of law under Rule 50(a), the four of them,
10:03:27 23 are each overruled.

10:03:29 24 Now, that gets us to the Court's Charge. Have
10:03:37 25 you-all had an opportunity to discuss this, and where are we on

10:03:42 1 that?

10:03:46 2 MR. STAKE: Your Honor, Sam Stake on behalf of Voxer.

10:03:48 3 Mr. Silbert and I were able to make a good deal of
10:03:51 4 progress last night in narrowing any remaining disputes. There
10:03:55 5 are just a couple of lingering issues that we are prepared to
10:04:02 6 essentially submit competing versions on to Your Honor and
10:04:05 7 leave to Your Honor's discretion.

10:04:09 8 I think there are essentially three that I would
10:04:12 9 address. The first one is that Voxer wishes for Your Honor to
10:04:18 10 include a jury instruction on this judicial notice issue that
10:04:23 11 we raised yesterday. I have a copy of that to submit to
10:04:27 12 Your Honor.

10:04:27 13 To recap, this is the question of taking judicial
10:04:32 14 notice of the public records of the five issued Voxer patents
10:04:37 15 before February 9th, 2012, which is when Mr. Deng, Facebook's
10:04:43 16 head of product, discussed the Voxer patents. I think we
10:04:48 17 have -- we had oral argument on that yesterday, and we have a
10:04:52 18 version of that jury instruction to hand up to Your Honor for
10:04:57 19 your consideration.

10:04:58 20 THE COURT: All right. You may pass those up.

10:05:09 21 MR. SILBERT: Your Honor, good morning. David
10:05:11 22 Silbert for Defendant.

10:05:12 23 May I just ask about the best way to proceed? Are we
10:05:16 24 going to take these issues *seriatim*? And I assume, it sounds
10:05:20 25 like, Sam, you want to start with the judicial notice issue?

10:05:24 1 MR. STAKE: That would be fine.

10:05:26 2 MR. SILBERT: Your Honor, would --

10:05:27 3 THE COURT: Well, I'm not sure -- I want to make sure
10:05:35 4 we're on the same page as what I perceive the kind of ground
10:05:41 5 rules to be here. I have started with what you presented as
10:05:48 6 your proposed final jury instructions back at the beginning of
10:05:54 7 trial. We are making some adjustments in those even as we
10:05:58 8 speak.

10:06:00 9 For instance, I think the word "foreperson" is a word
10:06:06 10 whose time never should have come in the history of
10:06:09 11 jurisprudence. I realize the world we live in and we don't
10:06:13 12 refer to "foreman" anymore, but I consider "foreperson" one of
10:06:18 13 the more strained words, so we're going to use "presiding
10:06:22 14 juror" throughout. And we're making some other little changes
10:06:25 15 like that.

10:06:25 16 But I think what I would like to do is kind of get an
10:06:31 17 overview on whatever you have on where you areas of dispute
10:06:37 18 are, and then I want to take a recess and consider these and
10:06:41 19 look at what I'm doing and then come back and resolve them. So
10:06:45 20 we don't need to argue them all right now.

10:06:47 21 So I've got down as area of disagreement, one, the
10:06:52 22 judicial notice issue. And my presumption from looking at this
10:07:02 23 Mr. Stake wants what he has presented me in the Court's Charge.
10:07:06 24 You are opposed to anything in the charge about the judicial
10:07:11 25 notice. So you won't be submitting -- you're not concerned

10:07:16 1 about the way he's worded it because you don't think it ought
10:07:18 2 to be there at all, so you're not going to be submitting
10:07:21 3 competing language.

10:07:23 4 MR. SILBERT: It is correct that we are opposed to it
10:07:25 5 being there. With the Court's permission, when that issue is
10:07:29 6 argued, Ms. Parikh will argue it, and I don't actually know if
10:07:32 7 she's going to critique the actual wording of the instruction.
10:07:36 8 But our fundamental point is that we don't think that
10:07:38 9 instruction should be there.

10:07:40 10 THE COURT: Well, Ms. Parikh, I'll give you a
10:07:41 11 heads-up. On anything where you're going to have a problem
10:07:47 12 with the language at any point, then I want to see your
10:07:50 13 language, too. So I would presume, in the absence of any
10:07:54 14 language that you have, that if I were to determine to submit
10:08:01 15 this instruction, you would object to it but you would not
10:08:05 16 propose competing language; is that correct?

10:08:08 17 MS. PARIKH: Yes, Your Honor. Meta proposes the
10:08:10 18 instruction in its entirety, as was discussed at length
10:08:14 19 yesterday, was premised on willfulness, and that is no longer
10:08:17 20 in the case.

10:08:17 21 THE COURT: All right. So what other issues do we
10:08:21 22 have?

10:08:21 23 MR. SILBERT: Your Honor, may I raise a practical
10:08:23 24 issue of, I guess, version control? And I apologize, but we
10:08:29 25 jointly have made some revisions. There's I believe, by my

10:08:35 1 count, four that we would like to discuss with Your Honor some
10:08:39 2 of the language. I don't think it's going to be too painful.

10:08:43 3 But we did make some agreed changes in the
10:08:46 4 instructions, which I think would mean that the version we're
10:08:50 5 working off of isn't going to match the version Your Honor has
10:08:55 6 been making changes to.

10:08:56 7 THE COURT: Well, has that been e-mailed to us, where
10:08:59 8 is your version?

10:09:00 9 MR. SILBERT: I don't believe that it has.

10:09:02 10 MR. STAKE: We have a copy of that ready to go to
10:09:05 11 Your Honor. There are a few areas of essentially cleaning up
10:09:08 12 the instructions and agreed-upon changes that we will e-mail to
10:09:14 13 Ms. Oakes.

10:09:15 14 THE COURT: Well, what I would think I would like to
10:09:17 15 do, then, before we get to further areas of disagreement is to
10:09:24 16 get that version set up in our computer, because that's the way
10:09:29 17 we're going to run it out eventually after we've made changes
10:09:34 18 and what have you.

10:09:35 19 So I think what I would like for you to do is e-mail
10:09:39 20 your version to us. And then I'll be taking a recess, and we
10:09:47 21 will -- we will combine that with what we're thinking about and
10:09:51 22 I'll get copies of that out to you-all. Because I don't think
10:09:57 23 we're going to get anywhere if we're not dealing off the same
10:10:00 24 copy.

10:10:00 25 MR. STAKE: Your Honor, that is a sensible approach.

10:10:02 1 And in view of Your Honor's ruling on the willfulness issue, it
10:10:06 2 will give us an opportunity to clean up a few of the remaining
10:10:09 3 issues. And I believe it will bring us closer to finality
10:10:14 4 here.

10:10:14 5 THE COURT: All right. So when -- you know, can I
10:10:19 6 expect something right now so we can go back in chambers and we
10:10:22 7 can start working on it from our point of view, or what are we
10:10:24 8 talking about on timeline?

10:10:26 9 MR. SILBERT: I think from a timing perspective, if I
10:10:30 10 may make a suggestion, Your Honor, I think it would be best to
10:10:33 11 send the Court the version that we were working on as of this
10:10:36 12 morning right now and we could talk through the changes.

10:10:39 13 I'll reiterate, I don't think there were a lot of
10:10:41 14 disputed issues, and I think Your Honor -- on our end, and I
10:10:45 15 think Your Honor is going to be able to make decisions pretty
10:10:48 16 quickly on each one of them.

10:10:49 17 THE COURT: All right. Go ahead and send that to us.

10:10:53 18 MR. SILBERT: Are you able to do that?

10:10:54 19 MR. STAKE: Your Honor, if we may, could we just take
10:10:57 20 a few minutes to --

10:10:59 21 THE COURT: Sure.

10:11:00 22 MR. STAKE: -- get this over to you?

10:11:01 23 THE COURT: I'm just trying to figure out when you
10:11:02 24 want to do this, because I've got other things I can be working
10:11:03 25 on. But it's -- I have got to have the charge in our word

10:11:14 1 processing equipment so, as I make changes -- and there's going
10:11:17 2 to be probably some formatting changes because of the way I do
10:11:21 3 things, so I can do that. So I need that as quickly as
10:11:25 4 possible, knowing the jury is going to be here in three hours.
10:11:28 5 So how much time are you talking about?

10:11:30 6 As I've told the lawyers that were at the bench a
10:11:33 7 couple of times during this trial, these things take much
10:11:35 8 longer with all the fancy equipment than I can ever imagine.
10:11:40 9 When I started trying lawsuits a long time ago, and I have now
10:11:50 10 had a law license 53 years, which is shocking to me, I swear
10:11:55 11 before we had this fancy equipment we got charges done more
10:11:58 12 quickly and copies circulated to all of the lawyers than we do
10:12:04 13 now. So we can burn up three hours here in no time at all.

10:12:07 14 So I need to know -- I need to get it as quickly as
10:12:10 15 possible so we can start working on it on our part while you're
10:12:14 16 working on your part before we talk again. So when am I going
10:12:19 17 to get something?

10:12:20 18 MR. STAKE: Thirty minutes, Your Honor.

10:12:21 19 THE COURT: Okay. That's a long time. But get it to
10:12:25 20 me as quick as we can. We'll be in recess until I can get it
10:12:29 21 printed out and worked on myself.

10:12:34 22 MR. SILBERT: Your Honor, I just put this out as an
10:12:37 23 option, because we are short on time. And, obviously, whatever
10:12:39 24 the Court prefers, we are fine with. But we do have hard
10:12:43 25 copies, and I wonder if it wouldn't make sense, given the time

10:12:47 1 constraints --

10:12:48 2 THE COURT: Give me a hard copy, and then you-all do
10:12:53 3 what you're going to do. And I'll take this back and start
10:12:59 4 going through it and seeing where we are. So we'll just be at
10:13:04 5 ease while you-all are doing what you're doing and I'm doing
10:13:07 6 what I'm doing.

10:13:08 7 MR. SILBERT: May I address one very brief
10:13:10 8 housekeeping issue?

10:13:11 9 THE COURT: Yes.

10:13:11 10 MR. SILBERT: We prepared a proposed order regarding
10:13:13 11 the provisional sealing that the Court had ordered before the
10:13:18 12 trial. I have copies. Voxer's counsel has confirmed that they
10:13:22 13 don't oppose signing it.

10:13:33 14 THE COURT: I'll do that.

10:13:41 15 MR. SILBERT: Your Honor, would it be helpful for me
10:13:43 16 to identify the I think four areas of dispute before
10:13:47 17 Your Honor?

10:13:47 18 THE COURT: No. Because I've got to get -- see, I've
10:13:50 19 got to get this in my format because it's not in my format.

10:13:54 20 You know, for instance, what I send to the jury is
10:13:56 21 not going to say "Final Joint Jury Instructions." That's not
10:14:00 22 what I do. I don't -- I'm not likely to use the intermediate
10:14:12 23 headings of "Jury Instruction 14," "Jury Charge," or anything
10:14:16 24 like that. I'm likely to delete all of those. As I said, one
10:14:22 25 of the things I know I'm going to do is we're going to refer to

10:14:24 1 the "presiding juror." You know, I will give paragraph
10:14:32 2 headings, but I'm not going to call them a jury instruction
10:14:37 3 number. And I'm going to look and see as we go through these,
10:14:41 4 you know, what language adjustments that I may have due to the
10:14:45 5 way I usually give things.

10:14:46 6 So the biggest thing is we've got a lengthy set of
10:14:50 7 instructions here, you know, about 40 pages worth, 39 pages
10:14:57 8 worth. And that takes a good long time to get that and run out
10:15:02 9 and what have you. And so I need to get this done as quickly
10:15:08 10 as I can because we can't go any further until this gets into
10:15:12 11 my machine.

10:15:13 12 MR. SILBERT: Understood.

10:15:14 13 MR. STONE: Your Honor, I've confirmed with my team,
10:15:15 14 and we'll have it you in the next 10 minutes.

10:15:17 15 THE COURT: Okay. That's good. And everybody just
10:15:19 16 be at ease while we're working on this, because I don't know
10:15:22 17 when I'm going to back out and when I'm not. So we're on it.

10:15:25 18 (Recess)

10:54:50 19 (Open court, no jury)

10:54:50 20 THE COURT: All right. Be seated, please. What I
10:54:52 21 have done is looked at the most recent draft that you sent us,
10:55:00 22 and we'll work off of that.

10:55:08 23 But, at the time, I'm going to refer to the way I
10:55:13 24 generally give things and we'll work it out. It doesn't mean
10:55:20 25 I'm wedded to any of this. So take out your draft. Let me go

10:55:24 1 through it. The first page we're going to format into our way,
10:55:36 2 but there's no substantive changes. And I'm going to -- after
10:55:45 3 we discuss your stuff, then I'll run out another draft the way
10:55:47 4 we do things.

10:55:49 5 I generally don't give the jury a table of contents,
10:55:52 6 but I'm open-minded on that. Throughout the charge I'm not
10:55:58 7 going to say "Jury Instruction 14" or what have you. I won't
10:56:03 8 give those numbers. But I will give them, generally, a
10:56:10 9 lead-in, a caption.

10:56:12 10 Now, looking on your current draft, if you look on
10:56:16 11 pages 1 and 2, everywhere you use "counsel" or "attorneys," I'm
10:56:21 12 going to use "lawyers." We always get bogged down in charges
10:56:27 13 where we call ourselves different ways, and I've found the
10:56:33 14 jurors are generally happy enough if I just say "lawyers." And
10:56:37 15 sometimes we miss it, but I'm not going to use "counsel" or
10:56:41 16 "attorneys," I'm just going to use "lawyers."

10:56:43 17 And then page 2 "foreperson" becomes "presiding
10:56:47 18 juror."

10:56:49 19 Now, let me ask you a question about your pages 3
10:57:02 20 and 4. Three is charts and summaries, and four is
10:57:06 21 demonstrative exhibits. I guess we really need both of those,
10:57:20 22 but I don't know if there's any way we can combine them into
10:57:24 23 one. They refer to the same thing. But if we keep them the
10:57:29 24 way they are, and it's fine with me if we do, I'm going to --
10:57:40 25 I'm going to use the word "demonstrative" wherever we use

10:57:45 1 "exhibits" just because I want it clear to them.

10:57:48 2 So the demonstrative exhibits thing would read
10:57:53 3 "Certain demonstrative exhibits shown to you, such as
10:57:55 4 PowerPoint presentations, posters, or models are not themselves
10:58:00 5 evidence. It's the parties' description of picture or model
10:58:02 6 used. If your recollection of the evidence differs from the
10:58:05 7 demonstrative exhibit, rely on your recollection."

10:58:08 8 So, if you're comfortable, we'll do charts and
10:58:12 9 summaries and demonstratives.

10:58:15 10 MR. SILBERT: David Silbert for Defendants,
10:58:16 11 Your Honor.

10:58:16 12 I was simply going to say we of course defer to the
10:58:19 13 court and to what plaintiffs want. But I don't think in
10:58:21 14 looking at this the parties admitted any actual summary
10:58:25 15 exhibits, as I would think of a summary exhibit that summarizes
10:58:30 16 voluminous documents.

10:58:30 17 So I think on our part we would be okay doing away
10:58:33 18 with that instruction and simply reading the instruction on
10:58:37 19 demonstratives.

10:58:38 20 THE COURT: I think that's right. How do you feel
10:58:40 21 Mr. Stake?

10:58:48 22 MR. STAKE: Your Honor, we had in mind here --

10:58:51 23 THE COURT: You're going to have to speak into a
10:58:53 24 microphone. I don't care if you sit down, but I've got to be
10:58:56 25 able to hear you. And there's one right in front of you if you

10:58:58 1 don't want to come all the way up here.

10:59:03 2 MR. STAKE: Your Honor, we had in mind here the sorts
10:59:05 3 of charts and summaries that came up in presentations by
10:59:09 4 experts.

10:59:12 5 THE COURT: Well, but all that the jury is going to
10:59:15 6 see is what were actually admitted into evidence.

10:59:23 7 MR. STAKE: And I'm not aware of any charts and
10:59:25 8 summaries that have been introduced into evidence. And so
10:59:31 9 perhaps -- perhaps a reference by adding a reference to charts
10:59:34 10 and summaries in Jury Instruction 16, that would help to
10:59:40 11 clarify the point that the charts --

10:59:46 12 THE COURT: What -- what charts and summaries other
10:59:50 13 than what were in the demonstratives did the jury ever see
10:59:58 14 during this case? Just tell me because I can't remember. I'm
11:00:00 15 not suggesting they didn't see any. I just don't remember any.

11:00:04 16 MR. STAKE: I believe Your Honor is correct, that
11:00:07 17 these are charts and summaries that appeared in demonstratives.

11:00:09 18 THE COURT: So I think if we just say
11:00:12 19 "demonstratives," I think we're fine.

11:00:15 20 MR. STAKE: Your Honor, that's fine.

11:00:25 21 THE COURT: And I have gone through, like on page 7,
11:00:27 22 I cut willfulness. Just because we've heard testimony from a
11:00:39 23 lot of people that can be accused of being nerds on some things
11:00:43 24 during this trial, when we go to page 8, I'm kind of a nerd on
11:00:48 25 editing, so I hyphenate "clear-and-convincing evidence." I'm

11:00:54 1 into phrasal adjectives. That doesn't affect anything.

11:00:56 2 Now, page 9. Here is something we're going to come
11:01:02 3 back to. But initially on page 9, I've gone through and
11:01:06 4 deleted the sentences on willfulness. Such as the second
11:01:12 5 sentence in the paragraph after the bullet points and the
11:01:17 6 fourth sentence in that paragraph. And then in the last full
11:01:20 7 paragraph on the page, I've deleted the last four lines.

11:01:33 8 On page 10, I found that the caption is a little
11:01:43 9 clunky, and I think I'm just going to say, "The role of a claim
11:01:51 10 of a patent," and I think that picks everything else up.
11:01:57 11 That's just a lead-in anyway.

11:01:59 12 Page 12, again, my nerdy editor stuff, I don't like
11:02:05 13 to put an "s" in parenthesis. So in that paragraph after the
11:02:11 14 bullet points that say claims with "s" in parenthesis, I'm just
11:02:16 15 going to say "claim or claims."

11:02:26 16 There's a couple of times we say proven. English
11:02:34 17 teachers are divided on whether or not you say "has proven." I
11:02:39 18 say "has proved" because I think jurors understand that more.

11:02:44 19 Now, when we get to page 15, this brings up something
11:02:53 20 that I generally do, and I think it is better than the way you
11:02:58 21 have done it. And that is, I think we ought to have at the
11:03:06 22 very beginning under burden of proof definitions of
11:03:11 23 preponderance of the evidence and clear and convincing evidence
11:03:14 24 as opposed to trying to stick it in here.

11:03:19 25 So I'm likely to cut, and also because I don't like

11:03:23 1 the italicized i.e., where we say "Must prove by a
11:03:29 2 preponderance of the evidence, i.e., it is more like than
11:03:33 3 not" -- I'm going to cut that -- "must prove by a preponderance
11:03:36 4 of the evidence that Facebook performed those."

11:03:38 5 And then up at the beginning somewhere, and we'll go
11:03:42 6 back and I'll kind of walk through the outline of what I
11:03:45 7 usually do, I'm likely to have a burden of proof section that
11:03:54 8 reads, "In any legal action, facts must be proved by a required
11:03:58 9 amount of evidence known as the burden of proof. The burden of
11:04:00 10 proof in this case is on Voxer on some issues and on Facebook
11:04:06 11 for other issues. There are two burdens of proofs that you
11:04:10 12 will apply in this case. One is the preponderance of the
11:04:11 13 evidence, and the other is clear and convincing evidence."

11:04:15 14 And then "Preponderance of the evidence. Voxer has
11:04:17 15 the burden of proving patent infringement and damages by a
11:04:21 16 preponderance of the evidence. To establish by a preponderance
11:04:24 17 of the evidence means to prove something is more likely so than
11:04:29 18 not so. It is simply the greater weight of the credible
11:04:33 19 evidence. If you find that Voxer has failed to prove any
11:04:36 20 element of its claim by a preponderance of the evidence, then
11:04:40 21 it may not recover on that claim."

11:04:42 22 And then "Clear and convincing evidence. Facebook
11:04:46 23 has the burden of proving patent invalidity by clear and
11:04:49 24 convincing evidence. When a party has the burden of proving
11:04:53 25 any claim or defense by clear and convincing evidence, it means

11:04:57 1 that the party must present evidence that leaves you with the
11:05:00 2 firm belief or conviction that it is highly probable that the
11:05:06 3 factual contentions of the claim or defense are true. This is
11:05:09 4 a higher standard of proof than proof by a preponderance of the
11:05:13 5 evidence, but it does not require proof beyond a reasonable
11:05:16 6 doubt."

11:05:18 7 Something to that effect. We can talk about the
11:05:19 8 language of that later. But I do want to have the burden stuff
11:05:25 9 moved back up to its own sections at the beginning of the
11:05:29 10 Court's Charge.

11:05:31 11 MR. SILBERT: Your Honor, I simply was going to say,
11:05:33 12 if it's helpful, that makes sense to us. There are -- I don't
11:05:36 13 know if the Court was looking at those, but there are
11:05:38 14 instructions whose language match what the Court read very
11:05:42 15 closely at pages 7 and 8, without the introductory, I think,
11:05:47 16 comments about burdens of proof.

11:05:50 17 THE COURT: Yeah. No. I saw that, and it's very
11:05:52 18 close. But I think my point is to kind of roll them into
11:06:00 19 something that -- you'll see when I do this, but that's one of
11:06:05 20 the things we're going to do.

11:06:07 21 Now, while we're on 15, we've got -- Voxer wants the
11:06:15 22 language at the bottom of the page, "Direct infringement is a
11:06:19 23 strict liability claim. A party can directly infringe a patent
11:06:22 24 without knowing of the patent or without knowing that what the
11:06:27 25 party is doing is patent infringement," and Facebook opposes.

11:06:31 1 So I don't want to hear much argument. I want Voxer
11:06:37 2 to tell me what your authority for my putting that in there,
11:06:42 3 and I want Facebook to tell me what's your authority for my not
11:06:46 4 putting it in there.

11:07:04 5 MR. STAKE: Your Honor, we believe that this strict
11:07:06 6 liability language is important to clarify the issue of jury --
11:07:11 7 potential jury confusion, which is the notion that Facebook
11:07:16 8 would need to have known about --

11:07:18 9 THE COURT: No, no. Tell me what your authority is.
11:07:19 10 I don't want any argument on it.

11:07:21 11 MR. STAKE: Okay. I have a case that I can have --

11:07:24 12 THE COURT: That's what I want to see.

11:07:26 13 MR. STONE: Okay. Can I have ...

11:07:29 14 THE COURT: Yeah. I don't have to see it this very
11:07:31 15 instant.

11:07:33 16 MR. STAKE: Okay. I have the cite for Your Honor.

11:07:35 17 THE COURT: All right. What is the cite?

11:07:36 18 MR. STAKE: Okay. It is *BMC Resources v. Paymentech*.

11:07:44 19 THE COURT: All right.

11:07:45 20 MR. STAKE: And this is 498 F-dot-three-d 1373.

11:07:50 21 THE COURT: Now, do you mean Federal Third? Is that
11:07:52 22 what you're saying?

11:07:54 23 MR. STAKE: It's Federal Circuit.

11:07:55 24 THE COURT: But you don't have to say

11:07:58 25 "F-dot-three-d." You're saying Federal Third?

11:07:58 1 MR. STAKE: Federal Third. Yes, your Honor.

11:08:00 2 THE COURT: Okay. I can understand that.

11:08:03 3 MR. STAKE: Yes.

11:08:03 4 THE COURT: All right. And the page number?

11:08:05 5 MR. STAKE: 1381. And it states that direct
11:08:07 6 infringement of a patent is a strict liability offense.

11:08:11 7 THE COURT: Well, does it say that it has to go in
11:08:13 8 the Court's Charge?

11:08:14 9 MR. STAKE: I don't believe that this was addressing
11:08:16 10 the Court's Charge.

11:08:17 11 THE COURT: All right.

11:08:19 12 MR. STAKE: It's a Federal Circuit decision.

11:08:25 13 MR. SILBERT: Very briefly, Your Honor, we don't
11:08:27 14 believe this paragraph is necessary. That said, we don't have
11:08:32 15 a strong opposition to it. Our only opposition is we don't
11:08:34 16 like the term "strict liability claim" in a jury instruction.
11:08:38 17 I don't think that's helpful to the jury, it's a legal term,
11:08:41 18 and it has little bit of a nefarious air to it.

11:08:44 19 THE COURT: Well, let's look at it this way. If I
11:08:47 20 were just to strike that first line and say, "A party can
11:08:52 21 directly infringe a patent without knowing of the patent or
11:08:56 22 without knowing that what the party's doing is patent
11:08:59 23 infringement," you're comfortable with that? It's you that
11:09:02 24 want the words "strict liability"?

11:09:04 25 MR. STAKE: That's right. We're just trying to avoid

11:09:06 1 jury confusion on this issue of --

11:09:08 2 THE COURT: Well, I think I'm going to confuse them
11:09:10 3 more. I'm not going to give that, because then I feel like I'm
11:09:13 4 going to have to define "strict liability" and we get into a
11:09:17 5 whole different thing. I think the substance is picked up in
11:09:22 6 the language, so I'm going to do that.

11:09:26 7 MR. STAKE: Thank you, Your Honor.

11:09:27 8 THE COURT: Now, over on page 18, Facebook opposes
11:09:43 9 the blue language?

11:09:59 10 MR. SILBERT: Your Honor, we think that for the Court
11:10:03 11 to call the claims of the '557 patents inventions, particularly
11:10:11 12 in an instruction on invalidity, is uncalled for and
11:10:15 13 prejudicial. We have a contrary proposal that we've shared
11:10:21 14 with counsel that I'd like to hand up to the Court, if I may,
11:10:26 15 for this instruction.

11:10:28 16 It does two things. Instead of saying, "The
11:10:40 17 inventions were invented" as an instruction from the Court, it
11:10:45 18 says, "The '557 patent claims priority to the date to which
11:10:50 19 they claim priority," which is really the issue and we think
11:10:53 20 much more appropriate language for a jury instruction.

11:10:56 21 The other thing it does is it indicates that the
11:11:01 22 Seckin reference is prior art, and it includes some statements
11:11:04 23 which are in front of Your Honor to the effect that all of the
11:11:08 24 disclosures, including the figures and text of Seckin are
11:11:13 25 considered part of the prior art.

11:11:14 1 We believe this is necessary in light of the
11:11:17 2 cross-examination and questioning which we think might have
11:11:20 3 created some confusion. There was some suggestion in the
11:11:23 4 questioning to the effect of comparing the claims of Seckin to
11:11:29 5 the patent, which is not the appropriate test for the jury, of
11:11:32 6 suggesting that because the Seckin application did not issue as
11:11:36 7 a patent, that somehow diminishes its status as prior art. So
11:11:41 8 we'd simply like this instruction to clarify that all of the
11:11:44 9 text of Seckin is to be considered prior art.

11:11:47 10 THE COURT: Well, let me ask you both: Why do I need
11:11:50 11 and why does the jury need either one of your proposed
11:11:53 12 instructions?

11:11:54 13 Why does the jury need anything about "inventions
11:11:59 14 defined were invented on a certain date," and why do I get into
11:12:14 15 detail on the Seckin reference?

11:12:14 16 MR. STAKE: Your Honor, we heard various arguments
11:12:15 17 from Facebook's counsel, including in opening statement and
11:12:20 18 elsewhere, that the fact that these patents were applied for in
11:12:23 19 2017 and '18 and issued in 2018 and '19 should somehow impact
11:12:29 20 the validity of these patents. And so this is a -- this first
11:12:37 21 sentence is taken directly from the AIPLA jury instruction.

11:12:40 22 We don't believe that the invention date is -- is
11:12:43 23 disputed as to October 19th, 2007. I don't -- and I don't
11:12:48 24 believe I've heard any opposition to the second sentence here
11:12:52 25 that we've proposed.

11:12:54 1 As to the rest of this instruction, I think this is
11:12:59 2 probably akin to the juror notebook issue, just where we'd be
11:13:03 3 concerned that this would put a thumb on the scale, so to
11:13:08 4 speak, as to this piece of prior art. We think that the issue
11:13:12 5 of when this reference was publicly disclosed and these other
11:13:18 6 contentions here were developed in cross-examination, including
11:13:22 7 yesterday.

11:13:22 8 And so we would ask for just these first two
11:13:27 9 sentences with the invention language, and I would ask to hand
11:13:32 10 up this AIPLA model jury instruction.

11:13:39 11 THE COURT: Would you not hand it up if you weren't
11:13:41 12 asked to hand it up? Since we're talking about the way things
11:13:47 13 are worded, you kind of act like, well, now I've had my
11:13:50 14 argument but somebody else at my table wants me to show this to
11:13:55 15 you, so I'm just going to do it.

11:13:57 16 MR. STAKE: Your Honor, would you like me to hand
11:13:59 17 this up to you.

11:14:00 18 (Laughter)

11:14:00 19 THE COURT: Hand it to me.

11:14:26 20 So, Mr. Silbert, you know, this -- I presume that
11:14:36 21 these cases probably support the AIPLA model patent jury
11:14:43 22 instructions.

11:14:47 23 MR. SILBERT: I haven't seen, Your Honor, what
11:14:49 24 counsel just handed you.

11:14:51 25 THE COURT: Well, show him a copy of that. Is this

11:14:55 1 the only copy that lives?

11:15:02 2 MR. SILBERT: The AIPLA, which is an independent body
11:15:08 3 of attorneys --

11:15:08 4 THE COURT: I'm very aware of that.

11:15:10 5 MR. SILBERT: -- has not been the primary source of
11:15:12 6 jury instructions. As Your Honor knows, we've tried to use the
11:15:15 7 Northern District of California instructions. I guess I'd
11:15:17 8 reiterate and I could read these cases, but I'd say we have a
11:15:21 9 pretty strenuous objection to the Court referring to the patent
11:15:27 10 claims as inventions at all, and particularly in a -- in an
11:15:31 11 instruction on invalidity. And I just don't see why that's
11:15:34 12 necessary.

11:15:35 13 If they want to make a point about priority date,
11:15:38 14 it's perfectly accurate to say as -- and if it's necessary, and
11:15:42 15 I'm really not sure it's necessary, as the Court commented.
11:15:46 16 But to the extent it is necessary, it's perfectly accurate and
11:15:51 17 appropriate to say that the patents claim priority to a
11:15:54 18 particular date, and then the further explanation that that's
11:15:57 19 the date that the jury should consider for purposes of prior
11:16:01 20 art.

11:16:01 21 THE COURT: All right. I'm going to look at this.
11:16:03 22 Let me tell you what I'm leaning toward doing, is not using the
11:16:12 23 invention language, because that's really not the way I've ever
11:16:16 24 seen one of these cases tried, much less this one. I've got a
11:16:21 25 world of respect for the AIPLA, but it seems like it does

11:16:27 1 insert something where we've argued all along about filings at
11:16:32 2 the patent office and what we do and that your patent contains
11:16:36 3 the invention.

11:16:36 4 I'm inclined, so you can think about this a little
11:16:40 5 bit and prepare your objections accordingly, to say, "The '557
11:16:45 6 patent claims priority to a provisional application filed on
11:16:49 7 October 19, 2007," which is the first sentence of what Facebook
11:16:55 8 wants, and then saying, "For the purposes of determining the
11:17:00 9 validity of the '557 patent, you may only consider prior art
11:17:04 10 that was publicly disclosed before October 19th, 2007" and not
11:17:09 11 say anything specific about the Seckin reference. And you-all
11:17:15 12 can pick that up in argument and argue it that way.

11:17:18 13 And so that's -- I'm going to give some more thought
11:17:22 14 to this, but that's what I'm inclined to do.

11:17:47 15 You know, page 23, I don't really have a problem of
11:17:50 16 your level of ordinary skill in the art. I just pass on this
11:17:55 17 as an editorial comment. I think the person of skill in the
11:18:03 18 art is the single most confusing thing to juries in a patent
11:18:09 19 case, because I never have lawyers tell me we're of agreement
11:18:18 20 and you look at the jury and say, "A person of skill in the art
11:18:21 21 is so and so and this is what they've done."

11:18:24 22 When I ask people during Markman hearings, well, tell
11:18:27 23 me who the person of skill in the art is, people look at their
11:18:30 24 shoes and they dance around, and nobody ever wants to tell me
11:18:33 25 what a person of skill in the art is.

11:18:35 1 I don't think the jury here knows who a person of
11:18:39 2 skill in the art is. But I think, since that's the way these
11:18:47 3 things go, your proposed paragraphs is as good as any. But
11:18:51 4 I've always thought that we ought to confront the jury more
11:18:58 5 with exactly who is supposed to be analyzing this.

11:19:01 6 I have a farming patent right now which, believe me,
11:19:04 7 if it goes to trial is going to be a whole lot easier to try
11:19:07 8 than this case was, involving sesame seeds. I mean, I can
11:19:11 9 grasp all of the things about this. And I feel like at some
11:19:15 10 point, if we try that case, I'm just going to look at the jury
11:19:16 11 and say, "It's a farmer. Just know that. That's all you have
11:19:20 12 to worry about. Forget all about these technical terms about
11:19:24 13 they grow or not. What would have a farmer have known at the
11:19:27 14 time this seed was done?

11:19:30 15 All right. Page 25. I'm not going to say "The Court
11:19:40 16 will account for interest later, if appropriate." I'm going to
11:19:46 17 say, "You must not add any amount of damages for interest." I
11:19:50 18 may word it a little bit differently because I always put that
11:19:53 19 in, that they're supposed to just look at the damages and
11:19:56 20 they're not supposed to give any consideration to anything else
11:20:00 21 that is outlying out there. So there will be some language in
11:20:04 22 one that I bring out that you will see that will say something
11:20:07 23 about not putting interest in there.

11:20:20 24 MR. SILBERT: Thank you, Your Honor.

11:20:21 25 THE COURT: Now, tell me about page 30, your proposed

11:20:23 1 jury instruction 38.

11:20:27 2 MR. SILBERT: This was an agreed instruction in the
11:20:30 3 set of agreed instructions that we submitted pretrial.

11:20:35 4 THE COURT: Yes.

11:20:36 5 MR. SILBERT: Voxer is now proposing to strike it.
11:20:38 6 We oppose striking it. It's a correct statement of the law, as
11:20:43 7 everyone agreed when we submitted it as an agreed instruction.
11:20:46 8 And it's highly applicable in this case and all patent cases.

11:20:50 9 I think what Voxer is going to say is that Facebook
11:20:53 10 did not offer certain potential design-around, noninfringing
11:21:00 11 alternatives that we had described in discovery and, had
11:21:03 12 Your Honor given us a whole lot more time for this trial, I
11:21:06 13 think maybe we would have. But that's something that hit the
11:21:09 14 cutting room floor. But that doesn't matter for purposes --

11:21:12 15 THE COURT: You didn't use all the time I gave you.

11:21:14 16 MR. SILBERT: I know. I do know that.

11:21:16 17 THE COURT: So that kind of falls hollow here.

11:21:19 18 MR. SILBERT: Well, that I understand.

11:21:20 19 THE COURT: But Voxer told me they were going to
11:21:21 20 finish in eight hours the first time around.

11:21:23 21 MR. SILBERT: They did.

11:21:24 22 THE COURT: And the second time they said, well, you
11:21:25 23 know, if you're going give them any more than that, give them
11:21:29 24 ten. Well, you kind of went beyond ten, too.

11:21:31 25 MR. SILBERT: Your Honor, I'd like to draw the

11:21:33 1 Court's attention to just two sentences in this agreed
11:21:35 2 instruction. One starts on the third line. It says, "Voxer
11:21:39 3 has the burden to persuade you that no noninfringing
11:21:44 4 alternatives existed by a preponderance of the evidence."

11:21:46 5 So, first of all, it -- although we did introduce
11:21:50 6 evidence, which I'll get to in a second, it was not incumbent
11:21:54 7 on Facebook to introduce evidence that there are alternative --
11:21:57 8 noninfringing alternatives. Voxer would have had to prove that
11:22:01 9 they didn't exist, first of all.

11:22:03 10 There was, in fact, a lot of testimony throughout the
11:22:06 11 trial by multiple witnesses of the existence of live streaming
11:22:09 12 technologies. There was discussion of people watching concerts
11:22:13 13 by Madonna on Youtube, et cetera, with millions of viewers,
11:22:18 14 about RealNetworks. All those --

11:22:19 15 THE COURT: Don't leave out Severe Tire Damage.

11:22:22 16 MR. SILBERT: And Severe Tire Damage. Thank you very
11:22:25 17 much, Your Honor. So that's point number one that makes this
11:22:28 18 relevant. And, really, what the jury ought to be considering
11:22:31 19 for damages, if anything, is the difference, the delta, between
11:22:37 20 preexisting technologies and what Voxer says its patents cover.

11:22:42 21 And then the other sentence I point the Court to is
11:22:45 22 just the next sentence which makes that clear. It says,
11:22:49 23 "Noninfringing technologies include, not only existing
11:22:52 24 technologies that do not infringe, but also technologies that
11:22:57 25 could reasonably have been developed that would not infringe."

11:23:00 1 And so the instruction is directly applicable to the
11:23:05 2 evidence in the case about preexisting streaming -- live
11:23:12 3 streaming technologies. We think it is highly relevant and
11:23:14 4 really an important instruction that the jury needs to have if
11:23:17 5 they are going to think about damages.

11:23:19 6 THE COURT: Do you have any authority for what you
11:23:20 7 just said?

11:23:26 8 MR. SILBERT: Well, Your Honor, I think we could find
11:23:27 9 it. This was an agreed instruction that we submitted as an
11:23:33 10 agreed statement of the law. So, respectfully, I don't think
11:23:40 11 the accuracy of this instruction is in dispute. I think their
11:23:41 12 argument -- and I don't want to anticipate Mr. Stake, but I
11:23:47 13 think their argument is going to be we didn't introduce these
11:23:48 14 particular potential design-arounds that we had talked about in
11:23:52 15 discovery. And my point is that doesn't matter. We -- it's
11:23:56 16 not incumbent on us to introduce anything.

11:23:59 17 THE COURT: All right. Mr. Stake?

11:24:00 18 MR. STAKE: Your Honor, I think just two points here.

11:24:02 19 Voxer's view is that the predicate, you know, the
11:24:07 20 basis for these has not been -- these purported noninfringing
11:24:11 21 substitutes has not been presented to Your Honor sufficient to
11:24:15 22 give this instruction.

11:24:16 23 And point two is that this would cause -- as a
11:24:18 24 result, this would cause jury confusion. We didn't hear any
11:24:23 25 testimony from Facebook's experts opining that there were

11:24:30 1 substitutes for Voxer's technology or that these were
11:24:34 2 commercially or technologically sufficient to be noninfringing
11:24:40 3 or to be substitutes.

11:24:42 4 And, simply, you know, Facebook had the opportunity
11:24:45 5 to present these views of its experts that it presented in, for
11:24:49 6 example, the reports that it served, and it elected not to
11:24:55 7 present these positions. And so it would be a major leap for
11:25:00 8 the jury to be asked to make some kind of determination on
11:25:06 9 noninfringing substitutes where there simply aren't -- isn't
11:25:10 10 sufficient expert testimony to support that or have them go
11:25:13 11 down that -- that road.

11:25:18 12 THE COURT: Well, I'm not sure I would be arguing it
11:25:28 13 your way. I'm not sure that I wouldn't be saying it ought to
11:25:31 14 be in there. Because, if I were on the jury and reading this,
11:25:37 15 it would cause me to think, from Facebook's point of view, that
11:25:41 16 maybe they did infringe and now this is an excuse to get out of
11:25:45 17 it.

11:25:46 18 So, you know, I don't know that your positions are
11:25:51 19 really where they ought to be. But if that's where we are,
11:25:57 20 I'll give some thought to it and either include it or not. I'm
11:26:06 21 not sure it's something that I would really want if I were you,
11:26:09 22 but I understand your situation.

11:26:11 23 All right. Now, I know what I'm going to draft on
11:26:13 24 that. Let me talk to you a little bit about something that is
11:26:19 25 a little bit different than the way I've done it in the past.

11:26:23 1 We went through earlier as we went through this your -- let me
11:26:43 2 find it -- your summary of contentions.

11:26:52 3 And, as I said, all I'm going to do with that, or
11:26:55 4 would do with that, is take out the willfulness references.
11:27:05 5 But I have not in the past really put in a summary of
11:27:14 6 contentions, but it's fine to do it. But what is kind of tied
11:27:23 7 to that and what you don't have in here is the stipulated
11:27:33 8 facts. I usually put the stipulated facts in here because the
11:27:37 9 jury -- the jury doesn't have them in front of them. I read
11:27:41 10 them to the jury at the beginning of trial, but I usually put
11:27:45 11 those in the Court's Charge.

11:27:49 12 And that, then, would get us into a little bit of a
11:28:03 13 deal on what we're going to do about how we handle claims
11:28:15 14 construction, which is kind of interesting here because I
11:28:17 15 didn't do the claim construction.

11:28:18 16 But normally what I would say, there would be
11:28:23 17 something to where I would have the claim term. But since
11:28:28 18 we've got four claim terms that we say plain and ordinary
11:28:32 19 meaning on and two that we say preamble is limiting on, and
11:28:38 20 that's not really the way you handled it -- and I don't have a
11:28:48 21 problem with the way you handled it -- what do we do about
11:28:54 22 stipulated facts? And do we -- are you comfortable with
11:28:58 23 leaving it your way on the way you-all have talked about plain
11:29:01 24 and ordinary meaning and what have you and not putting in
11:29:04 25 anything else about what claims construction would do?

11:29:11 1 MR. STAKE: Your Honor, one initial comment from
11:29:13 2 Voxer. Our understanding is that there was just one term that
11:29:19 3 was addressed in the claim construction order that is still at
11:29:23 4 issue here in this case. This is the single term. I think
11:29:27 5 it's "end-to-end connection." That was the only one where
11:29:30 6 plain and ordinary meaning was decided. The other terms that
11:29:34 7 were addressed are from other patents that are no longer being
11:29:37 8 asserted in the case.

11:29:41 9 THE COURT: Well, you're right. It's end-to-end
11:29:43 10 connection. Well, it seems to me that we -- we don't make any
11:29:54 11 further reference to that, that you-all are comfortable with
11:29:59 12 the way you have it. Am I right on that?

11:30:01 13 MR. STAKE: That's fine, Your Honor.

11:30:02 14 THE COURT: All right. So what do we do about the
11:30:07 15 other stipulated facts? Do you want a section on that in the
11:30:18 16 charge or not? I will tell you the reason it's crawled its way
11:30:24 17 into my charges in patent cases and others is generally the
11:30:27 18 lawyers tell me that jurors sometimes don't know -- you know,
11:30:32 19 we tell them they're to consider the evidence and the exhibits
11:30:35 20 and stipulated facts, and that it's sometimes helpful for them
11:30:39 21 to know what the stipulated facts are.

11:30:40 22 The stipulated facts in this case, you know, may or
11:30:49 23 may not be helpful to the jury, may or may not be a big deal.
11:30:52 24 And it might be helpful to know these corporate things. But I
11:30:57 25 don't -- I'm not committed to one way or the other. I normally

11:31:01 1 do it. If you want it, I'll do it. If you don't want it, I
11:31:04 2 won't do it.

11:31:05 3 MR. SILBERT: Your Honor, it makes eminent sense as a
11:31:07 4 suggestion. I'm going to confess that I just hadn't even
11:31:10 5 thought about it. May I just confer with our team and make a
11:31:13 6 suggestion?

11:31:15 7 MR. STAKE: Your Honor, we would be fine with reading
11:31:18 8 the stipulated facts. They aren't very lengthy. And the only
11:31:21 9 point here is there may have been a reference to a couple of
11:31:25 10 patents that are no longer asserted in the stipulated facts.
11:31:28 11 Let me see.

11:31:29 12 THE COURT: Yeah. We can --

11:31:31 13 MR. STONE: In the version I'm looking at, I don't
11:31:33 14 see any reference to those. I only the see '270 and '557. But
11:31:36 15 that was the one -- the one note.

11:31:38 16 THE COURT: Well, we would take out any reference to
11:31:41 17 the -- about the '030 and the '969. There were stipulated
11:31:46 18 facts on that.

11:31:47 19 MR. SILBERT: That's what my colleagues were saying,
11:31:49 20 that it was, I guess, an older version that still referred to
11:31:52 21 the patents that were no longer in the case. But I think,
11:31:57 22 assuming we delete those references, I don't think we would
11:32:01 23 object to it. I'm not sure we see a strong need for it, but I
11:32:04 24 don't think we'd object to it.

11:32:06 25 THE COURT: All right. Then what I'm likely to do is

11:32:08 1 take out -- I'll take out anything about claims construction,
11:32:11 2 and I'll take out the reference to the '030 and the '969.

11:32:16 3 Now, let me run through couple of other things that I
11:32:22 4 normally do that you'll see. I generally give a rundown about
11:32:44 5 determining the credibility and truthfulness of the witnesses.
11:32:48 6 I say a pretty good amount about that. I tell them a little
11:32:53 7 bit more about expert witnesses. And so we're going to --
11:33:09 8 we'll massage that around a little bit.

11:33:11 9 So here's what we're going to do. If you don't have
11:33:14 10 anything else right now, we're going to take what we just
11:33:17 11 discussed, and I'm going to incorporate it into our deal. I'm
11:33:23 12 going to give it to you to look at. The first one you get will
11:33:27 13 not be your take-it-or-leave-it, state your objections. It
11:33:31 14 will be for you to look at, and we'll talk about it one more
11:33:35 15 time. And if it's all right, fine. If it's not, I'll take up
11:33:40 16 what your problems are with it, and then I'll go back and
11:33:43 17 decide what I'm going to do with it. And then I'll bring you
11:33:46 18 your take-it-or-leave-it and state your objections.

11:33:49 19 MR. SILBERT: Thank you very much, Your Honor. I
11:33:50 20 could also report that -- and counsel can confirm -- that in
11:33:55 21 light of the court's ruling this morning regarding willfulness,
11:33:58 22 I understand that Voxer's prior request for judicial notice is
11:34:02 23 withdrawn. So I don't think there's any other issues.

11:34:06 24 THE COURT: That true?

11:34:08 25 MR. STAKE: Confirmed, Your Honor.

11:34:09 1 THE COURT: All right. Very good. All right. We'll
11:34:12 2 go to work here.

12:37:41 3 (Recess)

12:37:41 4 (Open court, no jury)

12:37:41 5 THE COURT: This is the verdict form that picks up
12:54:57 6 your revisions and puts it in our form. So you can look that
12:54:59 7 over while we talk about it.

12:55:14 8 I've distributed to each side a copy of the proposed
12:55:19 9 charge for discussion purposes. So just because it's an easy
12:55:29 10 default, I'll start with the plaintiff. Comments?

12:55:36 11 MR. STAKE: Your Honor, we have gone through a few
12:55:39 12 what I'd call "nits," just minor changes.

12:55:41 13 THE COURT: There's always that, so run through them
12:55:45 14 with me.

12:55:46 15 MR. STAKE: Okay. Happy to. On page 7 under Summary
12:55:55 16 of Contentions.

12:55:59 17 THE COURT: All right.

12:56:04 18 MR. STAKE: In the second to last sentence that
12:56:06 19 begins "Facebook also argues," after the asserted claims, we
12:56:12 20 would add "of the '557 patents are invalid."

12:56:16 21 THE COURT: Just a minute. I have to find you. Oh.
12:56:19 22 In the next-to-the-last paragraph. "Facebook also argues that
12:56:24 23 the asserted claims of the '557 patent"? That's what you want
12:56:30 24 in it?

12:56:30 25 MR. STAKE: Yes, Your Honor.

12:56:31 1 THE COURT: Any problem from the defendants?

12:56:34 2 MR. SILBERT: No, Your Honor. And we did compare
12:56:36 3 notes on these, and I believe everything Mr. Stake is going to
12:56:39 4 say is something we agreed to.

12:56:41 5 THE COURT: All right. Then I won't come back to
12:56:43 6 you. But if you hear something that gives you pause, jump up.

12:56:48 7 MR. SILBERT: We'll do that. Thank you.

12:56:50 8 THE COURT: All right. Next, Mr. Stake?

12:56:52 9 MR. STAKE: Then on the last line of page 7 just
12:56:55 10 below, where it states "The Voxer patents," we would again just
12:57:00 11 say "The '557 patent."

12:57:02 12 THE COURT: "The asserted claims of the '557 patent"?

12:57:08 13 MR. STAKE: Correct.

12:57:10 14 THE COURT: Okay.

12:57:18 15 MR. STAKE: On page 13 under the heading Patent
12:57:22 16 Invalidity Generally.

12:57:27 17 THE COURT: Yes.

12:57:28 18 MR. STAKE: We have two similar edits where we would
12:57:32 19 replace "Voxer patents" with "'557 patents" again.

12:57:43 20 '557 patent.

12:57:44 21 THE COURT: No. I'm just looking. So it would be on
12:57:47 22 the second line. And did you say there were two places that
12:57:56 23 appears?

12:57:57 24 MR. STAKE: That's right. In the next sentence.

12:57:59 25 THE COURT: No -- where -- all right. Go ahead.

12:58:03 1 MR. STAKE: Okay.

12:58:04 2 THE COURT: Because all I've done is correct line 2
12:58:06 3 right now.

12:58:10 4 MR. STAKE: Pardon me. Let me correct the record.
12:58:13 5 So line 2 we would leave as is.

12:58:18 6 THE COURT: Oh. The Voxer patents?

12:58:22 7 MR. STAKE: Under the doctrine of equivalents, we
12:58:24 8 would leave that as is.

12:58:24 9 THE COURT: No. I'm in Patent Invalidity Generally.

12:58:27 10 MR. STAKE: Okay. In that one, in line 2 of that
12:58:29 11 section, we would replace "Voxer patents" with "'557 patents".

12:58:33 12 THE COURT: All right. And I thought you told me
12:58:34 13 there was two places in that paragraph. Am I wrong?

12:58:37 14 MR. STAKE: Yes. That's right.

12:58:38 15 THE COURT: Okay. Now go to your next one.

12:58:41 16 MR. STAKE: Okay. The next one is in the next
12:58:43 17 sentence. It should say, "To prove any claim of the '557
12:58:45 18 patent is invalid."

12:58:54 19 THE COURT: All right. "To prove that any claim of
12:58:55 20 the '557 patent is invalid." Got it.

12:59:05 21 MR. STAKE: Yes. Thank you. On page 14 under the
12:59:07 22 heading Patent Invalidity - Obviousness, in the first line we
12:59:11 23 would again replace "Voxer patents" with "'557 patent".

12:59:22 24 THE COURT: All right.

12:59:28 25 MR. STAKE: And on page 16, which is a few pages into

12:59:34 1 Instruction F --

12:59:37 2 THE COURT: Yep.

12:59:38 3 MR. STAKE: -- it's before the numbered list 1 to 9,
12:59:41 4 the top of that page we would replace "Voxer patents" with
12:59:43 5 "'557 patent".

12:59:53 6 THE COURT: All right.

13:00:02 7 MR. STAKE: In the section on Damages - Introduction,
13:00:05 8 which is Section I, Facebook had requested a sentence on
13:00:13 9 interests that Your Honor indicated --

13:00:15 10 THE COURT: All right. I put that in the -- in the
13:00:17 11 verdict form. If you look at that new verdict form, you'll see
13:00:21 12 under damages, that's where I put that the jury is not to
13:00:26 13 consider interest. Is it all right to have it in the verdict
13:00:29 14 form?

13:00:29 15 MR. SILBERT: Yes.

13:00:30 16 THE COURT: All right.

13:00:30 17 MR. SILBERT: Thank you, Your Honor.

13:00:31 18 THE COURT: Okay.

13:00:36 19 MR. STAKE: Now, on page 22 there's an instruction
13:00:39 20 Damages - Comparable Agreements. This is a section that the
13:00:43 21 parties have agreed to eliminate.

13:00:45 22 THE COURT: Okay. No problem.

13:01:01 23 MR. STAKE: And on page 24 under Section P, Damages -
13:01:08 24 Date of Commencement of Damages, the parties have agreed to
13:01:13 25 delete the second sentence which begins, "If you find that the

13:01:18 1 infringed Voxer patent" and ends with "that the infringement
13:01:21 2 began."

13:01:22 3 THE COURT: All right. So we take that whole
13:01:23 4 sentence out?

13:01:25 5 MR. STAKE: Correct, Your Honor.

13:01:26 6 THE COURT: So we have the first sentence and then go
13:01:28 7 right into, "If you find that the infringed Voxer patent was
13:01:33 8 granted, et cetera, et cetera."

13:01:35 9 MR. STAKE: Correct.

13:01:35 10 THE COURT: Okay.

13:01:37 11 MR. STAKE: That's all that we had. Our
13:01:39 12 understanding is this is not ...

13:01:40 13 THE COURT: No. But now that we have those little
13:01:44 14 things taken care, of let me hear do you have any big things
13:01:49 15 you want to suggest, or do you just -- is there anything we
13:01:55 16 ought to talk about? Who knows? You might convince me to
13:01:58 17 change something before you have to make your ...

13:02:01 18 MR. STAKE: Your Honor, no major discussion
13:02:02 19 warranted, I believe. But we did want to preserve our
13:02:05 20 objection as to the instruction and damages availability of
13:02:11 21 noninfringing substitutes for the reasons we gave earlier.

13:02:14 22 THE COURT: Okay. We'll get back to that.

13:02:16 23 All right. Mr. Silbert?

13:02:18 24 MR. SILBERT: Nothing further, Your Honor. Thank
13:02:19 25 you.

13:02:19 1 THE COURT: All right. Then what we're going to do
13:02:21 2 is I'm going to make these changes. Hopefully it won't take
13:02:25 3 long. We'll come back, give you the final jury charge, and
13:02:29 4 then we'll be -- we'll bring in the jury and argue it.

13:02:32 5 Now, have you had a chance to look over that verdict
13:02:35 6 form, and is -- do you have any additional comments on it or is
13:02:40 7 it fine? It pretty much incorporated everything you had in
13:02:44 8 your last one. It just moved it to the way we do things.

13:02:48 9 And so you'll know, the reason I cut the sentence
13:02:51 10 that said that the jury foreman should hang on to the verdict
13:02:56 11 form and bring it to the courtroom, is when I'm told we have a
13:03:00 12 verdict, I will have a court security officer bring the verdict
13:03:03 13 form to me and I will look at it to make sure there's not some
13:03:07 14 clerical error or something in it that would cause me to want
13:03:10 15 to send it back to them before I notify you. And so, if
13:03:13 16 there's not, I'm going to send it back to the jury, and then
13:03:16 17 when the jury comes in, the presiding juror will have it.

13:03:19 18 So there wasn't anything secretive about why I cut
13:03:24 19 that line out. It's just I thought, you know, when the court
13:03:27 20 security officers says, Well, give me the form to show the
13:03:30 21 judge, the presiding juror might say, No, no. The judge says I
13:03:33 22 can't give it to you. I'm supposed to bring it in myself. So
13:03:36 23 that's why I cut it out.

13:03:38 24 MR. STAKE: Your Honor, Sam Stake for Voxer.

13:03:39 25 There was just one small change that I believe we

13:03:42 1 agreed on with Facebook's counsel on page 5 of the verdict
13:03:46 2 form.

13:03:47 3 THE COURT: All right.

13:03:50 4 MR. STAKE: We would have it just state "Facebook"
13:03:53 5 rather than "Facebook, Inc. and Instagram LLC."

13:03:58 6 THE COURT: I think that's fine, and that's
13:04:00 7 consistent with what we've done before. So we'll make that
13:04:05 8 change.

13:04:05 9 All right?

13:04:07 10 MR. SILBERT: That's fine.

13:04:08 11 THE COURT: We're good with that. Then we're going
13:04:10 12 to get this in final form. I'll come in and hear your formal
13:04:13 13 objections, and then we'll be ready to go.

13:04:17 14 (Recess)

13:18:59 15 (Open court, no jury)

13:18:59 16 THE COURT: Will you distribute the final charge and
13:19:02 17 verdict form to the lawyers.

13:19:05 18 Beginning with the plaintiffs, if there are
13:19:07 19 objections to the jury charge, you may make them at this time.

13:19:29 20 MR. STAKE: Your Honor same, Sam Stake for Voxer.

13:19:31 21 Voxer wishes to preserve its objection to instruction
13:19:36 22 and damages, availability of noninfringing substitutes, for the
13:19:39 23 reasons we've stated previously. We further wish to preserve
13:19:45 24 all other objections that we have stated on the record thus
13:19:49 25 far.

13:19:50 1 THE COURT: Those objections are noted by the court,
13:19:52 2 and they are overruled.

13:19:54 3 Any objections from the defendants?

13:19:57 4 MR. SILBERT: Your Honor, David Silbert for
13:19:59 5 defendants.

13:19:59 6 We would preserve any objections previously stated,
13:20:02 7 but we have no additional objections to state at this time.

13:20:06 8 THE COURT: Those likewise are noted and overruled.

13:20:08 9 Are you ready for me to read the charge and argue to
13:20:13 10 the jury?

13:20:15 11 MR. STONE: Yes, Your Honor.

13:20:16 12 THE COURT: All right. For the plaintiffs, as I said
13:20:18 13 I'm going to break after your initial argument. How long do
13:20:22 14 you intend to argue for the initial argument?

13:20:25 15 MR. STONE: Approximately 40, 45 minutes, Your Honor.

13:20:28 16 THE COURT: All right. Then what we'll do is what I
13:20:33 17 told you earlier. I'll read the charge to the jury, you'll
13:20:35 18 make your 45-minute argument, we'll take a brief recess. Then
13:20:39 19 the defendants will make their argument, and you'll close.

13:20:47 20 MR. STONE: Thank you, Your Honor.

13:20:47 21 THE COURT: All right. Bring in the jury.

13:22:55 22 (Open court, jury present)

13:22:55 23 **COURT'S INSTRUCTIONS TO THE JURY**

13:22:55 24 THE COURT: We're now coming to an end and will soon
13:23:00 25 be putting this case in your hands.

1 So Members of the jury: It is my duty and
2 responsibility to instruct you on the law you are to apply in
3 this case. The law contained in these instructions is the only
4 law you may follow. It is your duty to follow what I instruct
5 you the law is, regardless of any opinion that you might have
6 as to what the law ought to be.

7 Each of you is going to have your own printed copy of
8 these final jury instructions that I am giving you now, so
9 there is really no need for you the take notes unless you just
10 want to.

11 If I have given you the impression during the trial
12 that I favor either party, you must disregard that impression.
13 If I have given you the impression during the trial that I have
14 an opinion about the facts of this case, you must disregard
15 that impression. You are the sole judges of the facts of this
16 case. Other than my instructions to you on the law, you should
17 disregard anything I may have said or done during the trial in
18 arriving at your verdict.

19 You should consider all of the instructions about the
20 law as a whole with regard each instruction in light of the
21 others, without isolating a particular statement or paragraph.

22 The testimony of the witnesses and other exhibits
23 introduced by the parties constitutes the evidence. The
24 statements of lawyers are not evidence; they are only
25 arguments. It is important for you to distinguish between the

1 arguments of lawyers and the evidence on which those arguments
2 rest. What the lawyers say or do is not evidence. You may,
3 however, consider their arguments in light of the evidence that
4 has been admitted and determine whether the evidence admitted
5 in this trial supports the arguments. You must determine the
6 facts from all of the testimony that you have heard and the
7 other evidence submitted. You are the judges of the facts, but
8 in finding those facts, you must apply the law as I instruct
9 you.

10 You are required by law to decide the case in a fair,
11 impartial, and unbiased manner, based entirely on the law and
12 on the evidence presented to you in the courtroom. You may not
13 be influenced by passion, prejudice, or sympathy you might have
14 for Voxer or Facebook in arriving at your verdict.

15 After the remainder of these instructions, you will
16 hear closing arguments from the lawyers. Statements and
17 arguments of the lawyers, I remind you, are not evidence, and
18 they are not instructions on the law. They are intended only
19 to assist the jury in understanding the evidence and the
20 parties' contentions.

21 A verdict form has been prepared for you. You are to
22 take this verdict form with you to the jury room; and when you
23 have reached a unanimous decision or agreement as to the
24 verdict, you are to have your presiding juror fill in the
25 blanks in the verdict form, date it, and sign it.

1 Answer each question in the verdict form from the
2 facts as you find them to be. Do not decide who you think
3 should win the case and answer the questions to reach that
4 result. Again, your answers and your verdict must be
5 unanimous.

6 Do not let bias, prejudice, or sympathy play any
7 party in your deliberations. A corporation and all other
8 persons are equal before the law and must be treated as equals
9 in a court of justice.

10 In determining the weight to give the testimony of a
11 witness, consider whether there was evidence that at some time
12 the witness said or did something, or failed to say or do
13 something, that was different from the testimony given at the
14 trial.

15 A simple mistake by a witness does not necessarily
16 mean that the witness did not tell the truth as he or she
17 remembers it. People may forget some things or remember other
18 things inaccurately. If a witness has made a misstatement,
19 consider whether that misstatement was an intentional falsehood
20 or simply an innocent mistake. The significance of that may
21 depend on whether it has to do with an important fact or an
22 unimportant detail.

23 In any legal action, facts must be proved by a
24 required amount of evidence known as the "burden of proof."
25 The burden of proof in this case is on Voxer for some issues

1 and on Facebook for other issues. There are two burdens of
2 proof that you will apply in this case. One is the
3 preponderance of the evidence, and the other is
4 clear-and-convincing evidence.

5 Voxer has the burden of proving patent infringement
6 and damages by a preponderance of the evidence. To establish
7 by a preponderance of the evidence means to prove something is
8 more likely so than not. It is simply the greater weight of
9 the credible evidence. If you find that Voxer has failed to
10 prove any element of its claim by a preponderance of the
11 evidence, then it may not recover on that claim.

12 Facebook has the burden of proving patent invalidity
13 by clear-and-convincing evidence.

14 When a party has the burden of proving any claim or
15 defense by clear-and-convincing evidence, it means that the
16 party must present evidence that leaves you with a firm belief
17 or conviction that it is highly probable that the factual
18 contentions of the claim or defense are true. This is a higher
19 standard of proof than proof by a preponderance of the
20 evidence, but it does not require proof beyond a reasonable
21 doubt.

22 The evidence you are to consider consists of the
23 testimony of the witnesses, the documents and other exhibits
24 admitted into evidence, and any fair inferences and reasonable
25 conclusions you can draw from the facts and circumstances that

1 have been proved.

2 Generally speaking, there are two types of evidence.
3 One is direct evidence, such as the testimony of an eyewitness.
4 The other is indirect or circumstantial evidence.
5 Circumstantial evidence is evidence that proves a fact from
6 which you can logically conclude another fact exists. As a
7 general rule, the law makes no distinction between direct and
8 circumstantial evidence but simply requires that you find the
9 facts from a preponderance of all of the evidence, both direct
10 and circumstantial.

11 You alone are to determine the questions of
12 credibility or truthfulness of the witnesses. In weighing the
13 testimony of the witnesses, you may consider the witness's
14 manner and demeanor on the witness stand, any feelings or
15 interest in the case, or any prejudice or bias about the case
16 that the witness may have, and any consistency or inconsistency
17 of the witness's testimony considered in the light of the
18 circumstances. Has the witness been controlled -- pardon me.
19 Has the witness been contradicted by other credible evidence?
20 Has the witness made statements at other times and places
21 contrary to those made here on the witness stand? You must
22 give the testimony of each witness the credibility that you
23 think it deserves.

24 Even though a witness may be a party to the action
25 and, therefore, interested in the outcome, the testimony may be

1 accepted if it is not contradicted by direct evidence or by any
2 inference that may be drawn from the evidence, if you believe
3 the testimony.

4 You are not to decide the case by counting the number
5 of witnesses who have testified on the opposing sides. Witness
6 testimony is weighed; witnesses are not counted. The test is
7 not the relative number of witnesses, but the relative
8 convincing force of the evidence. The testimony of a single
9 witness is sufficient to prove any fact, even if a greater
10 number of witnesses testified to the contrary, if after
11 considering all of the other evidence, you believe that
12 witness.

13 When knowledge of technical subject matter may be
14 helpful to the jury, a person who has special training or
15 experience in that technical field is permitted to state an
16 opinion on those technical matters. However, you are not
17 required to accept that opinion. As with any other witness, it
18 is up to you to decide whether to rely on it.

19 Certain demonstrative exhibits shown to you, such as
20 PowerPoint presentations, posters, or models, are illustrations
21 of the evidence, but are not themselves evidence. It is the
22 party's description, picture, or model used to describe
23 something involved in the trial. Your recollection of the
24 evidence differs from the demonstrative exhibits -- if your
25 recollection of the evidence differs from the demonstrative

1 exhibits, rely on your recollection.

2 For the purposes of this action only, the parties do
3 not contest the following. These are stipulated facts:

4 (a) This Court has jurisdiction over the parties and
5 all claims and defenses in this action.

6 (b) Voxer is a Delaware corporation with its
7 principal place of business at 1999 Bryan Street, Suite 900,
8 Dallas, Texas 75201-3140.

9 (c) Voxer LLC is a Delaware limited liability company
10 and the legal owner by assignment of the Asserted Patents.
11 Voxer IP LLC is a wholly-owned subsidiary of Voxer, Inc.

12 (d) Meta Platforms, Inc. f/k/a Facebook, Inc., is a
13 Delaware corporation with a principal place of business at
14 1601 Willow Road, Menlo Park, California.

15 (e) Instagram LLC is a limited liability company and
16 a wholly-owned subsidiary of Meta Platforms, Inc.

17 (f) Defendants Meta Platforms, Inc. f/k/a Facebook,
18 Inc., and Instagram LLC own and operate the facebook.com and
19 instagram.com websites, and make available the Facebook Live
20 and Instagram Live services, as well as the Facebook and
21 Instagram applications for mobile devices.

22 (g) The application leading to the '270 Patent was
23 filed on May 2nd, 2017 and the '270 Patent was issued on
24 November 27th, 2018 by the U.S. Patent Office.

25 (h) For purposes of this litigation, the parties

1 agree that the '270 patent is entitled to a priority date of no
2 earlier than June 28th, 2007.

3 (i) The application leading to the '557 patent was
4 filed on October 16th, 2018, and the '557 patent was issued on
5 December 17th, 2019 by the U.S. Patent Office.

6 (j) For purposes of this litigation, the parties
7 agree that the '557 patent is entitled to a priority date of no
8 earlier than June 28th, 2007.

9 (k) On January 7th, 2020, Voxer filed this patent
10 infringement action against Defendants.

11 As I did at the start of this case, I will now give
12 you a summary of each side's contentions in this case. I will
13 then provide you with detailed instructions on what each side
14 must prove to prevail on each of its contentions.

15 As I previously told you, Voxer seeks money damages
16 from Facebook for allegedly infringing the Voxer patents by
17 making, using, selling, and offering for sale methods that
18 Voxer argues are covered by one or more of the asserted claims
19 of those patents, which are:

20 Claims 34, 47, 48, and 51 of the '270 patent; and
21 Claims 1 and 9 of the '557 patent.

22 Voxer contends that Facebook directly infringes each
23 of these claims. Facebook denies that it has infringed any of
24 the asserted claims of the Voxer patents. Facebook also argues
25 that the asserted claims of the '557 patent are invalid. I

1 will instruct you later as to the ways in which a patent may be
2 invalid.

3 Your job is to decide whether Facebook has infringed
4 the asserted claims of the Voxer patents and whether any of the
5 asserted claims of the '557 patent are invalid. If you decide
6 that any asserted claim has been infringed and is not invalid,
7 you will need then to decide any money damages to be awarded to
8 Voxer to compensate it for the infringement.

9 Before you can decide many of the issues in this
10 case, you'll need to understand the role of the patent claims.
11 The patent claims are the numbered sentences at the end of each
12 patent. The claims define a patent owner's rights under the
13 law. The claims are important because it is the words of the
14 claims that define what the patent covers. The figures and
15 text in the rest of the patent provide a description or
16 examples of the invention, and they provide a context for the
17 claims; but it is the claims that define the breadth of the
18 patent's coverage.

19 Therefore, what a patent covers depends, in turn, on
20 what each of its claims cover.

21 To know what a claim covers, a claim sets forth, in
22 words, a set of requirements. Each claim sets forth its
23 requirements in a single sentence. The requirements of a claim
24 are often referred to as "claim elements" or "claim
25 limitations." When a method meets all of the requirements of a

1 claim, in other words, where it meets all of its limitations or
2 all of its elements, the claim is said to cover that method;
3 and that method is said to fall within the scope of the claim.
4 In other words, a claim covers a method where each of the claim
5 elements or limitations is present in that method.

6 You will first need to understand what each claim
7 covers in order to decide whether or not there is infringement
8 of that claim and to decide whether or not the claim is
9 invalid. The first step is to understand the meaning of the
10 words used in the patent claim.

11 The law says that it is my role to define the terms
12 of the claims, and it is your role to apply my definitions to
13 the terms I have construed to the issues that you have been
14 asked to decide in this case.

15 The beginning portion of a claim, also known as the
16 preamble, often uses the word "comprising." The word
17 "comprising," when used in the preamble, means "including but
18 not limited to" or "containing but not limited to." When
19 "comprising" is used in the preamble, if you decide that an
20 accused method includes all of the requirements of that claim,
21 the claim is infringed. This is true even if the accused
22 method contains additional elements.

23 You are to use the plain and ordinary meaning of the
24 words of the patent claims as understood by a person of
25 ordinary skill in the art, which is to say, in the field of

1 technology of the patent at the time of the invention. The
2 meaning of the words of the patent claims must be the same when
3 deciding both issues of infringement and validity.

4 This case involves two types of patent claims:
5 independent claims and dependent claims.

6 An "independent claim" sets forth all of the
7 requirements which must be met in order to cover that claim.
8 Thus, it is not necessary to look at any other claim to
9 determine what an independent claim covers. In this case, the
10 following claims are independent claims:

11 Claim 34 of the '270 patent; and Claim 1 of the '557
12 patent.

13 The remainder of the asserted claims in the Voxer
14 Patents are "dependent claims." A dependent claim does not
15 itself recite all of the requirements of the claim but refers
16 to another claim for some of its requirements. In this way,
17 the claim "depends" on another claim. A dependent claim
18 incorporates all of the requirements of the claim or claims to
19 which it refers. The dependent claim then adds its own
20 additional requirements. To determine what a dependent claim
21 covers, it is necessary to look at both the dependent claim and
22 any other claim or claims to which it refers. A method that
23 meets all the requirements of both the dependent claim and the
24 claim or claims to which it refers is covered by that dependent
25 claim. In this case, the following claims are dependent

1 claims:

2 Claims 47, 48, and 51 of the '270 patent; and Claim 9
3 of the '557 patent.

4 The use of the terms "a" or "an" in a claim is a term
5 of art, which has a special meaning in the context of a patent
6 claim. When used in a claim, the terms "a" or "an" means "one
7 or more."

8 The subsequent use of the definite article "the" or
9 "said" in a claim refers back to the same claim term and does
10 not change the general plural rule or similarly refers to "one
11 or more."

12 I will now instruct you on how to decide whether the
13 Voxer -- whether or not Voxer has proved that Facebook
14 infringed any of the asserted claims of the Voxer Patents.

15 Patent law gives the owner of a valid patent the
16 right to exclude others from importing, making, using, offering
17 to sell, or selling the claimed invention or performing a
18 method claimed in the patent within the United States during
19 the term of the patent. Any person or business entity that has
20 engaged in any of those acts without the patent owner's
21 permission infringes the patent.

22 In determining infringement, you must compare
23 Facebook's accused methods to the asserted claims of the Voxer
24 patents infringement.

25 There are two types of "direct infringement": (1)

1 "literal infringement" and (2) "infringement under the doctrine
2 of equivalents." I will now instruct you on literal
3 infringement, and then will provide an instruction on
4 infringement under the doctrine of equivalents.

5 In order to prove literal infringement of an asserted
6 patent claim, Voxer must prove by a preponderance of the
7 evidence that Facebook performed within the United States an
8 accused method that meets all of the requirements of the
9 asserted claim and did so without Voxer's permission. You must
10 compare the accused methods with each and every one of the
11 requirements of the asserted claim to determine whether all of
12 the requirements of that claim are met.

13 You must determine, separately for each asserted
14 claim, and separately for each accused method, whether or not
15 there is infringement. For dependent claims, if you find that
16 a claim to which a dependent claim refers is not infringed,
17 there cannot be infringement of that dependent claim. On the
18 other hand, if you find that an independent claim has been
19 infringed, you must still decide, separately, whether the
20 accused method meets the additional requirement or requirements
21 of any claims that depend from the independent claim to
22 determine whether those dependent claims have also been
23 infringed. This is because a dependent claim includes all of
24 the requirements of any of the claims to which it refers, plus
25 additional requirement or requirements of its own.

1 A party can directly infringe a patent without
2 knowing of the patent or without knowing that what the party is
3 doing is patent infringement.

4 If a company makes, uses, sells, or offers to sell
5 within the United States a method that does not literally meet
6 all of the elements of a claim and thus does not literally
7 infringe that claim, there can still be direct infringement if
8 that method satisfies the claim elements under the doctrine of
9 equivalents.

10 Under the doctrine of equivalents, a method infringes
11 a claim if the accused method contains elements or steps that
12 literally meet or are equivalent to each and every element of
13 the claim. You may find that an element or step is equivalent
14 to an element of a claim that is not met literally if a person
15 having ordinary skill in the field of technology of the patent
16 would have considered the differences between them to be
17 "insubstantial" or would have found that the element or step:
18 (1) performs substantially the same function and (2) works in
19 substantially the same way (3) to achieve substantially the
20 same result as the element of the claim.

21 In order to prove infringement by "equivalents,"
22 Voxer must prove the equivalency of the element or step of the
23 claim element by a preponderance of the evidence. Thus, each
24 element of a claim must be met by the accused method either
25 literally or under the doctrine of equivalents for you to find

1 infringement. If the accused method is missing an equivalent
2 method step to even one method step of the asserted patent
3 claim, the accused method cannot infringe under the doctrine of
4 equivalents.

5 Known interchangeability of the claim element and the
6 proposed equivalent is a factor that can support a finding of
7 infringement under the doctrine of equivalents. In order for
8 the elements or step to be considered interchangeable, the
9 claim element must have been known at the time of the alleged
10 infringement by a person having ordinary skill in the field of
11 technology of the patent. Interchangeability at the present
12 time is not sufficient.

13 Voxer contends that if you find Facebook does not
14 literally infringe the asserted claims, then Facebook infringes
15 the asserted claims of the Voxer Patents under the doctrine of
16 equivalents.

17 I will now instruct you on the rules you must follow
18 in deciding whether or not Facebook has proved that the
19 asserted claims of the '557 patent are invalid. To prove that
20 any claim of the '557 patent is invalid, Facebook must persuade
21 you by clear-and-convincing evidence, that is, you must be left
22 with a clear conviction that the claim is invalid. Otherwise,
23 you must conclude that Facebook has not proved that the claim
24 is invalid.

25 The '557 patent claims priority to a provisional

1 application filed on October 19th, 2007. For purposes of
2 determining the validity of the '557 patent, you may only
3 consider prior art that was publicly disclosed before
4 October 19th, 2007.

5 In order for someone to be entitled to a patent, the
6 invention must actually be "new." A patent claim is invalid if
7 the claimed invention is not new. If an invention is not new,
8 we say that it is "anticipated" by the prior art.

9 Anticipation must be determined on a claim-by-claim
10 basis. In order to show that a claim is anticipated, Facebook
11 must prove by clear-and-convincing evidence that all of the
12 requirements of the claim are present in a single piece of
13 prior art. You may not find that prior art anticipates a
14 patent claim by combining two or more elements of prior art.

15 To anticipate the invention, the prior art does not
16 have to use the same words as the claim, but all of the
17 requirements of the claim must have been disclosed and arranged
18 as in the claim. The claim requirements may either be
19 disclosed expressly or inherently, that is, necessarily
20 implied, such that a person having ordinary skill in the art in
21 the technology of the invention, looking at that one reference,
22 could make and use the claimed invention.

23 If a dependent claim is anticipated by the prior art,
24 then the claims from which it depends are necessarily
25 anticipated as well.

1 Facebook contends in this case that the asserted
2 claims of the '557 patent are invalid as being obvious.

3 Even though an invention may not have been
4 identically disclosed or described in a single prior art
5 reference before it was made by an inventor, the invention may
6 have been obvious to a person of ordinary skill in the field of
7 technology of the patent at the time the invention was made.

8 Facebook may establish that a patent claim is invalid
9 by proving, by clear-and-convincing evidence, that the claimed
10 invention would have been obvious to persons having ordinary
11 skill in the art at the time the invention was made in the
12 field of the invention.

13 In determining whether a claimed invention is
14 obvious, you must consider the level of ordinary skill in the
15 field of the invention that someone would have had at the time
16 the invention was made, the scope and content of the prior art,
17 any differences between the prior art and the claimed
18 invention, and, if present, so-called objective evidence or
19 secondary considerations, which I will describe shortly. Do
20 not use hindsight; consider only what was known at the time of
21 the invention.

22 Keep in mind that the existence of each and every
23 element of the claimed invention in the prior art does not
24 necessarily prove obviousness. Most, if not all, inventions
25 rely on the building blocks of prior art.

1 In considering whether a claimed invention is
2 obvious, you should consider whether, as of the priority date
3 of the asserted patents, there was a reason that would have
4 prompted a person of ordinary skill in the field to combine the
5 known elements in a way that the claimed invention does, taking
6 into account such facts as:

7 (1) Whether the claimed invention was merely the
8 predictable result of using prior art elements according to
9 their known function or functions;

10 (2) Whether the claimed invention provides an obvious
11 solution to a known problem in the relevant field;

12 (3) Whether the prior art teaches or suggests the
13 desirability of combining elements claimed in the invention;

14 (4) Whether the prior art teaches away from combining
15 elements in the claimed invention; and

16 (5) Whether it would have been obvious to try the
17 combinations of elements, such as when there is a design
18 incentive or market pressure to solve a problem and there are a
19 finite number of identified, predictable solutions.

20 To find it rendered the claimed invention obvious,
21 you must find that the prior art provided a reasonable
22 expectation of success.

23 In determining whether the claimed invention was
24 obvious, consider each claim separately and consider only what
25 was known at the time of the invention. In determining whether

1 the claimed invention was obvious, do not use hindsight. In
2 other words, you should not consider what a person of ordinary
3 skill in the art would know now or what has been learned from
4 the teaching of the '557 patent. In making these assessments,
5 you should take into account any objective evidence, sometimes
6 called secondary considerations, that may shed light on whether
7 or not the claimed invention is obvious. These include:

8 (1) Whether the claimed invention was commercially
9 successful as a result of the merits of the claimed invention
10 (rather than the result of design needs or market-pressure
11 advertising or similar activities);

12 (2) Whether the claimed invention satisfied a
13 long-felt need;

14 (3) Whether others had tried and failed to make the
15 claimed invention;

16 (4) Whether others invented the claimed invention at
17 roughly the same time;

18 (5) Whether others copied the claimed invention;

19 (6) Whether the claimed invention achieved unexpected
20 results;

21 (7) Whether the claim -- pardon me. (7) Whether
22 others in the field praised the claimed invention;

23 (8) Whether persons having ordinary skill in the art
24 of the invention expressed surprise or disbelief regarding the
25 claimed invention; and

1 (9) Whether the inventor proceeded contrary to
2 accepted wisdom in the field.

3 While these objective indicia must be taken into
4 account, you must consider all of the evidence related to
5 obviousness before you reach a decision.

6 In determining whether the claimed invention was
7 obvious, consider each claim separately, but understand that if
8 a dependent claim is obvious, then the claims from which it
9 depends are necessarily obvious as well.

10 In deciding what the level of ordinary skill in the
11 field of the invention is, you should consider all of the
12 evidence introduced at trial, including but not limited to: (1)
13 the levels of education and experience of the inventor and
14 other persons actively working in the field; (2) the types of
15 problems encountered in the field; (3) prior art solutions to
16 those problems; (4) the rapidity with which inventions are
17 made; and (5) the sophistication of the technology.

18 In considering whether the claimed invention was
19 obvious, you must first determine the scope and content of the
20 prior art. The scope and content of the prior art for deciding
21 whether the invention was obvious includes at least prior art
22 in the same field as the claimed invention. It also includes
23 prior art from different fields that a person of ordinary skill
24 in the art would have considered when trying to solve the
25 problem that is addressed by the invention.

1 Where Facebook is relying on prior art that differs
2 from the prior art considered by the Patent and Trademark
3 Office, you should give that prior art more weight when you are
4 considering whether the challenger has carried its burden of
5 proving invalidity.

6 If you find that Facebook infringed any claim of the
7 Voxer patents and that Facebook has not proved that such claim
8 is invalid, you must then consider what amount of damages to
9 award to Voxer. I will now instruct you on that measure of
10 damages. By instructing you on damages, I am not suggesting
11 which party should win this case on any issue. If you find
12 that Facebook has not infringed any valid claim of the asserted
13 patents, then Voxer is not entitled to damages.

14 The damages you award must be adequate to compensate
15 Voxer for the infringement. They are not meant to punish
16 Facebook.

17 Voxer has the burden to establish the amount of
18 damages by a preponderance of the evidence. In other words,
19 you should award only those damages that Voxer establishes that
20 are more likely than not it has suffered. While Voxer is not
21 required to prove the amount of damages with mathematical
22 precision, it must prove them with reasonable certainty. You
23 may not award damages that are speculative, damages that are
24 only possible, or damages that are based on guesswork.

25 In this case, Voxer seeks damages in the form of what

1 it contends to be a reasonable royalty. You must be careful to
2 ensure that the award is no more and no less than the value of
3 the patented inventions.

4 Facebook may also present evidence as to what
5 damages, if any, it believes would be due should you find that
6 Facebook infringes any valid asserted claim of the asserted
7 patents. Facebook's presentation of such evidence should not
8 be taken as an indication that Facebook believes that it
9 infringes or that the claims of the asserted patent are valid.

10 A royalty is a payment made to a patent holder in
11 exchange for the right to make, use, or sell the claimed
12 invention. A reasonable royalty is the amount of royalty
13 payment Voxer and Facebook would have agreed to in a
14 hypothetical negotiation taking place at the time immediately
15 prior to when the infringement first began.

16 In considering this hypothetical negotiation, you
17 should focus on what the expectation of Voxer and Facebook
18 would have been had they entered into an agreement at that
19 time, and had they acted reasonably in their negotiations.

20 Unlike in a real-world negotiation, all parties to
21 the hypothetical negotiation are presumed to believe that the
22 patents are valid and infringed and that both parties were
23 willing to enter into an agreement. The reasonable royalty you
24 determine must be a royalty that would have resulted from the
25 hypothetical negotiation and not simply a royalty either party

1 would have preferred.

2 Evidence of things that happened after the
3 infringement first began can be considered in evaluating the
4 reasonable royalty only to the extent that the evidence aids in
5 assessing what royalty would have resulted from a hypothetical
6 negotiation just prior to the first infringement.

7 A reasonable royalty award must be based on the
8 incremental value that the patented invention adds to the
9 accused services. When the infringing methods have both
10 patented and unpatented features, measuring this value requires
11 a determination of the value added by the patented features.
12 The ultimate combination of the royalty base and royalty rate
13 must reflect the value attributable to the infringing features
14 of the Facebook services, and no more.

15 Any amount of damages must be based solely on the
16 value attributable to the patented invention, as distinct from
17 unpatented features of the accused services or other factors
18 such as marketing, advertising, or Facebook's size.

19 A royalty compensating the patent owner for damages
20 must reflect the value attributable to the infringing features
21 of the services -- pardon me. Let me restate that.

22 A royalty compensating the patent owner for damages
23 must reflect the value attributable to the infringing features
24 of the services, and no more. The process of separating the
25 value of the allegedly infringing features from the value of

1 all other features is called apportionment. When the services
2 accused of infringement use both patented and unpatented
3 methods, your award must be apportioned so that it is based
4 only on the value of the patented methods, and no more.

5 In determining the amount of a reasonable royalty
6 that would have resulted from the hypothetical negotiations
7 between Voxer and Facebook, you may consider evidence on any of
8 the following factors, in addition to any other evidence
9 presented by the parties on the economic value of the patent:

10 These factors are: The rates paid by Facebook and
11 similar parties in the industry to license other patents
12 comparable to the Voxer patents.

13 The nature and scope of the license, as exclusive or
14 non-exclusive, or as restricted or non-restricted in terms of
15 its territory or with respect to whom the services may be sold.

16 The commercial relationship between Voxer and
17 Facebook, such as whether or not they are competitors in the
18 same territory in the same line of business.

19 The effect of selling the patented methods in
20 promoting other sales of Facebook and the extent of such
21 collateral sales.

22 The duration of the Voxer patents and the term of the
23 license.

24 The established profitability of the methods
25 performed under the Voxer patents; their commercial success;

1 and their popularity.

2 The utility and advantages of the patented inventions
3 over the old modes or devices, if any, that had been used for
4 achieving similar results.

5 The nature of the patented inventions; the character
6 of the commercial embodiment of the inventions as owned and
7 produced by or for the licensor; and the benefits to those who
8 have used the inventions.

9 The extent to which Facebook has made use of the
10 inventions, and any evidence that shows the value of that use.

11 The portion of the profit or of the selling price
12 that may be customary in the particular business or in
13 comparable businesses that allow for the use of the inventions
14 or analogous inventions.

15 The portion of the profit that arises from the
16 patented inventions themselves, as distinguished from
17 unpatented features, such as the manufacturing process,
18 business risks, or significant features or improvements added
19 by the accused infringer.

20 The opinion and testimony of qualified experts.

21 The amount that Voxer and Facebook would have agreed
22 upon (at the time the infringement began) if both sides had
23 been reasonable and voluntarily trying to reach an agreement;
24 that is, the amount which a prudent licensee, who desired as a
25 business proposition to obtain a license to manufacture and

1 sell a particular article embodying the patented invention,
2 would have been willing to pay as a royalty and yet be able to
3 make a reasonable profit and which amount would have been
4 acceptable by a patentee who was willing to grant a license.

5 No one factor is dispositive, and you can and should
6 consider the evidence that has been presented to you in this
7 case on each of these factors. You may also consider any other
8 factors which in your mind would have increased or decreased
9 the royalty the alleged infringer would have been willing to
10 pay and the patent owner would have been willing to accept,
11 acting as normally prudent businesspeople.

12 In determining a reasonable royalty, you should also
13 take into account whether Facebook could have implemented any
14 non-infringing technologies as an alternative to the patented
15 invention. These are called non-infringing alternatives.
16 Voxer has the burden to persuade you that no non-infringing
17 alternative existed by a preponderance of the evidence.
18 Non-infringing technologies include not only existing
19 technologies that do not infringe, but also technologies that
20 could reasonably have been developed and that would not
21 infringe. When a party can avoid a patent and replace an
22 infringing service with a non-infringing alternative, there is
23 little incentive for the party to take a license from the
24 patent owner rather than simply avoid the patent by
25 implementing a non-infringing alternative. By the same

1 reasoning, if avoiding the patent would be difficult,
2 expensive, and time-consuming, the amount the party would be
3 willing to pay for a license may be greater.

4 A reasonable royalty can be paid either in the form
5 of a one-time lump-sum payment or as a "running royalty."
6 Either method is designed to compensate the patent holder based
7 on the infringer's use of the patented technology. It is up to
8 you, based on the evidence, to decide what type of royalty, if
9 any, is appropriate in this case.

10 Reasonable royalty awards may take the form of a
11 lump-sum payment. A lump-sum payment is equal to an amount
12 that the alleged infringer would have paid at the time of a
13 hypothetical negotiation for a license covering all use of the
14 licensed methods, both past and future. When a lump sum is
15 paid, the infringer pays a single price for the license
16 covering both past and future infringing use.

17 Reasonable royalty awards may also take the form of a
18 running royalty based on the revenue from or the volume of use
19 of licensed methods. A running royalty can be calculated, for
20 example, by multiplying a royalty base by a royalty rate.

21 In determining the amount of damages, you must
22 determine when the damages began. If you find that the
23 infringed Voxer patent was granted after the infringing
24 activity began, damages should be calculated from the date the
25 patent issued.

1 It is now your duty to deliberate and to consult with
2 one another in an effort to reach a verdict. Each of you must
3 decide the case for yourself, but only after an impartial
4 consideration of the evidence with your fellow jurors. During
5 your deliberations, do not hesitate to reexamine your own
6 opinions and change your mind if you are convinced that you
7 were wrong. But do not give up on an honest belief because the
8 other jurors think differently, or just to finish the case.

9 Remember at all times, you are the judges of the
10 facts. You have been allowed to take notes during this trial.
11 Any notes that you took during this trial are only aids to
12 memory. If your memory differs from your notes, you should
13 rely on your memory and not on the notes. The notes are not
14 evidence. If you did not take notes, rely on your independent
15 recollection of the evidence and do not be unduly influenced by
16 the notes of other jurors. Notes are not entitled to greater
17 weight than the recollection or impression of each juror about
18 the testimony.

19 When you go into the jury room to deliberate, you may
20 take a copy of this charge, the exhibits that I have admitted
21 into evidence, and your notes. You must select a presiding
22 juror to guide you in your deliberations and to speak for you
23 here in the courtroom.

24 During your deliberations, you may not communicate
25 any information about this case to anyone by any means. For

1 example, do not talk face-to-face or use any electronic device
2 or media, such as the telephone, a cell phone, smartphone,
3 tablet or computer, the Internet, any Internet service, any
4 text or instant messaging service, any Internet chat room, blog
5 or website such as Twitter, LinkedIn, YouTube, Facebook,
6 Instagram, TikTok, or Snapchat or the like, or any other way to
7 communicate. You may not communicate to anyone any information
8 about this case or conduct any research about this case until
9 this case is over and I accept your verdict.

10 In other words, you cannot talk to anyone on the
11 phone, correspond with anyone, or electronically communicate
12 with anyone about this case. You can only discuss the case in
13 the jury room with your fellow jurors during deliberations.

14 Your verdict must be unanimous. After you have
15 reached a unanimous verdict, your presiding juror must fill out
16 the answers to the written questions on the verdict form and
17 sign and date it. Answer each question in the verdict form
18 from the facts as you find them. Do not decide who you think
19 should win and then answer the questions to reach that result.
20 Your answers and your verdict must be unanimous. After you
21 have concluded your service and I have discharged you, you are
22 not required to talk with anyone about the case.

23 If you need to communicate with me during your
24 deliberations, your presiding juror should write the inquiry
25 and give it to the court security officer. After consulting

1 with the lawyers, I will respond either in writing or by
2 meeting with you in the courtroom. Keep in mind, however, that
3 you must never disclose to anyone, not even to me, your
4 numerical division on any question.

5 And there's a place at the bottom for me to fill in
6 the date. It will say, Submitted this blank day of September
7 22 at blank o'clock p.m., and I will sign it and instruct you
8 that you may then proceed to the jury room.

9 Now, you will have a verdict form that you must
10 follow. Let me say little bit about the verdict form. It
11 varies slightly from the verdict form that you have had in your
12 notebooks. The form we gave you was to follow along during the
13 trial so you would know what you would be looking to answer.
14 But during every trial -- it's only television where a trial is
15 scripted where it always comes out exactly the way you're
16 looking for. So there have been little changes as we've gone
17 along, so I've prepared a new verdict form. And when you
18 retire to your jury room, Ms. Oakes, my courtroom deputy, will
19 give you each a copy of that new verdict form and pick up your
20 old verdict form so you won't get confused with what you're ave
21 having to answer.

22 The verdict form that whoever is elected your
23 presiding juror is the one then that should be filled out and
24 brought back to me.

25 The verdict form will read: In answering the

1 following questions, you are to follow the instructions I have
2 given you in the Court's jury charge. Your answers to each
3 question must be unanimous. Some of the questions contain
4 legal terms that are defined and explained to you in detail in
5 the jury charge. You should refer to and consider the jury
6 charge as your answer to these questions in the verdict form.

7 The asserted patents may be referred to as follows:

8 Patent Number 10,142, 270 may be referred to by the
9 shorthand term of the '270 patent.

10 And Patent Number 10,511,557 may be referred to by
11 the shorthand term the '557 patent.

12 Then the next page of the jury -- or the verdict form
13 reads: We, the jury, unanimously agree to the answers to the
14 following questions and return them as our verdict in this
15 case.

16 Question 1: Infringement.

17 Did Voxer Inc. and Voxer IP LLC ("Voxer") prove, by a
18 preponderance of the evidence, that Meta Platforms, Inc.
19 (formerly known as Facebook, Inc.) and Instagram LLC
20 (collectively "Facebook") infringed one or more of the
21 following claims of the asserted patents?

22 You're instructed to check yes or no for each claim,
23 and you're instruct that "yes" is a finding for Voxer and "no"
24 is a finding for Facebook. And then there are charts.

25 Claims 34, there's a column Facebook Live and another

1 column Instagram Live. And you're given yes and no choices for
2 each of those defendants. And the same is true as to Claim 47,
3 48, and 51 of the '270 patent.

4 Then the '557 patent is listed much the same way.
5 There's columns Facebook Live and Instagram Live, and Claim 1,
6 places to check either yes or no for each of the defendants,
7 and Claim 9 the same.

8 And then my instructions are: If you answered "no"
9 to all the claims, please proceed to the final page of the
10 verdict form.

11 If you selected "yes" to any claim of the '557
12 patent, please proceed to directly to Question 2.

13 If you selected "yes" to any claim of the '270 patent
14 and no to all claims -- claims of the '557 patent, please
15 proceed to Question 3.

16 Question 2 is invalidity.

17 Solely with respect to the claims of the '557 patent
18 for which you answered "yes" in Question 1, did Facebook prove
19 by clear and convincing evidence that one or more of those
20 claims of the below listed patents are invalid?

21 Check yes or no for each claim that corresponds to a
22 "yes" answer in Question 1. "Yes" is a finding for Facebook.
23 "No" is a finding for Voxer.

24 And it lists the '557 patent, Claim 1 and Claim 9,
25 and columns to check either yes or no for each claim.

1 Then my instructions are: If you selected "no" to
2 any claim of the '557 patent, or if you found any claim of the
3 '270 patent infringed in response to Question 1, please proceed
4 to Question 3.

5 Otherwise, please proceed to the final page of the
6 verdict form.

7 Then Question 3 is damages.

8 What sum of money, if any, do you find Voxer has
9 proved it is entitled to for Facebook and Instagram's
10 infringement up through the date of this verdict? Do not
11 include any interest on any amount of damages you find.

12 And there's blank preceded by a dollar sign, and
13 you're to fill that in in dollars and cents.

14 Question 4 refers back to Question 3. Does this
15 number represent a running royalty or a one-time lump sum?
16 Please check one only.

17 And it gives you a blank to check "running royalty"
18 or and it gives you another blank to check "lump sum."

19 And then your instructions are to proceed to the
20 final page of the verdict form.

21 The final page of the verdict form reads: You have
22 now reached the end of the verdict form and should review it to
23 ensure it accurately reflects your unanimous determinations.
24 The preceding -- the presiding juror should then sign and date
25 the verdict form in the spaces below. Once this is done,

14:18:54 1 notify the court security officer that reach -- you have
14:18:57 2 reached a verdict.

14:18:58 3 And it has a space, Signed this *blank* day of
14:19:01 4 September 2022 at *blank* o'clock *blank* m., where your presiding
14:19:06 5 juror will fill in the date and time of your verdict and sign
14:19:09 6 the verdict form.

14:19:13 7 THE COURT: Those will be the instructions of the
14:19:15 8 verdict form. And, ladies and gentlemen, at this time we'll
14:19:17 9 proceed with opening arguments and we'll proceed first with the
14:19:21 10 opening argument of the plaintiffs.

14:19:28 11 MR. STONE: Thank you, Your Honor.

14:19:29 12 **PLAINTIFF'S CLOSING ARGUMENT**

14:19:29 13 MR. STONE: May it please the Court:

14:19:30 14 Good afternoon, ladies and gentlemen. It's nice to
14:19:33 15 have a chance to speak directly to you again. My colleague,
14:19:38 16 Mike Powell, and I look forward to summarizing our case to you
14:19:42 17 this afternoon. But, before I do that, I just want to thank
14:19:46 18 you for the time that you've taken away from your lives to be
14:19:51 19 here. I've seen that you've all been taking notes and paying a
14:19:54 20 lot of attention to all of the testimony, and I know that we've
14:19:57 21 given you a lot of information over the course of the last
14:20:00 22 week. And I just wanted to say thank you again. This matter
14:20:04 23 is obviously very important to my client Voxer, and so we
14:20:07 24 certainly appreciate your attention.

14:20:09 25 Now, what I'm going to do is go back over the road

14:20:12 1 map that I shared with you during my opening. And, like the
14:20:16 2 judge said, there's four sources of evidence that are for your
14:20:20 3 consideration: There's the witness testimony, there's the
14:20:23 4 exhibits, there's stipulations, and there's certain assumptions
14:20:28 5 or presumptions that the judge has talked to you about.

14:20:33 6 And I'm confident that, when you all get together in
14:20:36 7 the jury room after you've heard our closing arguments and you
14:20:39 8 reflect on the questions that you've been asked to answer about
14:20:43 9 whether Facebook and Instagram live infringed the '270 and '557
14:20:48 10 patents, that you will agree that they do and that Voxer is
14:20:52 11 entitled to a reasonable royalty as a result.

14:20:58 12 Now you heard from Mr. Katis about the genesis of his
14:21:01 13 idea that led to Voxer, the problems that he had with
14:21:05 14 battlefield radios that led him to pondering about whether or
14:21:08 15 not there was a better solution; a hybrid technology that could
14:21:13 16 bridge the gap with between purely live communications, like a
14:21:16 17 phone call, and purely time-shifted communications like text or
14:21:20 18 e-mail. This is what Voxer would come to call "live
14:21:23 19 messaging."

14:21:25 20 And, to be clear, this wasn't live streaming. You
14:21:28 21 heard both Mr. Katis and Mr. Ranney testify that their
14:21:32 22 invention was not live streaming. And you certainly didn't see
14:21:35 23 the defendants rely on live streaming as prior art.

14:21:39 24 And you heard how Mr. Katis, after he got out of the
14:21:42 25 military, hired Mr. Ranney, a networking specialist, to help

14:21:47 1 him with the first company that Mr. Katis founded. And you
14:21:51 2 heard how the two of them pondered the questions that Mr. Katis
14:21:54 3 had about this new hybrid technology. And you'll recall that
14:21:58 4 Mr. Ranney, who joined Voxer as its chief technology officer,
14:22:02 5 spent lots of time with Mr. Katis and the other coinventors at
14:22:05 6 Voxer white-boarding how they would build their system.

14:22:09 7 And you heard Mr. Ranney testify that he wanted that
14:22:12 8 Voxer system to build -- to be scalable, a flexible network
14:22:17 9 that could easily expand to support the millions of users that
14:22:22 10 Voxer anticipated having, and ultimately did have, with it's
14:22:26 11 break-through live messaging technology.

14:22:29 12 And you heard from the beginning that Voxer had a
14:22:31 13 patent prosecutor, Jim Rose, on their team to help them
14:22:35 14 navigate the patent rules so they would have protection for the
14:22:39 15 ideas that they came up with related to live messages. So that
14:22:43 16 when they disclosed those ideas, as you heard Mr. Katis said
14:22:46 17 that he did always when he had meetings with other companies,
14:22:49 18 those ideas could be protected. And you heard that they did
14:22:54 19 get patents, many of them, that covered all aspects of the live
14:22:57 20 messaging technology. You heard that Mr. Katis and Mr. Ranney
14:23:01 21 are named inventors or more than 150 patents.

14:23:08 22 And they described the process for you in their
14:23:10 23 testimony about how it was that they went about getting those
14:23:11 24 patents, including filing their two provisional patent
14:23:16 25 applications in 2007. And you heard from Mr. Katis in his

14:23:19 1 testimony about what that first provisional disclosed, to do
14:23:23 2 for voice and video communications what e-mail, instant
14:23:26 3 messaging and devices like the Blackberry have done for written
14:23:30 4 correspondence. And he also testified that users could send
14:23:35 5 quick voice and video messages at the click of a button to any
14:23:38 6 number of users, without necessarily interrupting others'
14:23:42 7 conversations or waiting for acknowledgment.

14:23:45 8 And in their second provisional filed on
14:23:47 9 October 19, 2007, you heard Mr. Katis and Mr. Ranney testify
14:23:53 10 how that described their inventions in more detail. And you
14:23:56 11 heard the judge's instruction that the Voxer patents are
14:24:01 12 entitled to a priority date in 2007 and, in particular, that
14:24:05 13 the '557 patent is entitled to a priority date back to
14:24:09 14 October 19, 2007.

14:24:12 15 That's the date of the second provisional. And
14:24:14 16 Mr. Ranney testified when he was on the stand that some of the
14:24:17 17 things disclosed in that second provisional, including the
14:24:20 18 target markets that they had envisioned for live messaging, and
14:24:25 19 that those could include public and social networks and media
14:24:28 20 industries. And that he and Mr. Katis envisioned that live
14:24:32 21 messaging would be a natural for social networks using Voxer's
14:24:38 22 multiple conversation management system.

14:24:41 23 Now, you heard Mr. Katis and Mr. Ranney testify about
14:24:43 24 rolling out their Voxer app for iOS and Android in 2011 -- in
14:24:51 25 May for iOS and in November for Android. And you heard that,

14:24:55 1 at the time they did that, Mr. Ranney testified that the app
14:25:00 2 did not support video, but from the very beginning, he wrote
14:25:04 3 that the code for the server side was already there. And that
14:25:08 4 was not something that was ever challenged by Facebook.

14:25:12 5 Now to put back in perspective how things were when
14:25:17 6 Voxer rolled out its app in 2011, Mr. Ranney gave you testimony
14:25:22 7 about how phones back then couldn't support live video. They
14:25:25 8 weren't powerful enough to do that. And he also testified that
14:25:28 9 bandwidth on the networks wasn't fast enough to support live
14:25:32 10 video. Voxer was ahead of its time, which explains the sheer
14:25:36 11 number of its patents. And you heard Ms. Lawton say that Voxer
14:25:40 12 had actually more than 200 patents as a company. Its new live
14:25:44 13 messaging technology just needed the market to catch up with it
14:25:48 14 so that it could roll out video.

14:25:50 15 Now, shortly after the app's release in 2011, you
14:25:53 16 heard that the Voxer app went viral. You saw that the Voxer
14:25:57 17 app was often number one in the App Store, even ahead of
14:26:01 18 Facebook's social networking apps. And in 2012, you heard
14:26:05 19 Mr. Katis testify that it was number 13 out of all apps in the
14:26:10 20 App Store. And that by the end of 2012, Voxer had nearly
14:26:15 21 60 million total users.

14:26:18 22 Now, this success caught the attention of Facebook,
14:26:21 23 which in 2011 and 2012, reached out to Voxer on a number of
14:26:27 24 occasions to discuss the possibility of doing business
14:26:29 25 together. Again, for perspective, back in 2011, Facebook's

14:26:33 1 Messenger app didn't even offer voice. Voxer did, Facebook did
14:26:39 2 not.

14:26:40 3 And you heard that there were a series of meetings
14:26:42 4 between Voxer and Facebook, and you heard how, in all those
14:26:48 5 meetings, Mr. Katis would describe the origin story for Voxer's
14:26:52 6 live messaging technology as well as the patents that the
14:26:55 7 company had sought to protect that, and Mr. Ranney would
14:26:59 8 explain the technology in more detail.

14:27:02 9 And you heard Mr. Katis testify that he even told
14:27:06 10 Mr. Zuckerberg about Voxer's patents. And you heard Mr. Ranney
14:27:10 11 testify that it was important to Voxer to get those patents
14:27:14 12 because they were in an industry, telecommunications, with
14:27:17 13 strong existing patents, and they wanted to make sure that they
14:27:20 14 had protection for their unique inventions.

14:27:24 15 Now, you heard about some of the meetings that
14:27:26 16 occurred between Facebook and Voxer, including the
14:27:29 17 February 8th, 2012 meeting between Peter Deng, Ben Davenport,
14:27:37 18 and Mike Schroepfer and Mr. Katis. And internal documents from
14:27:41 19 Facebook after that meeting showed that Facebook viewed Voxer's
14:27:44 20 technology very positively.

14:27:47 21 In Exhibit 810, which is one of the exhibits admitted
14:27:50 22 into evidence, in an e-mail to Mr. Zuckerberg, Mr. Schroepfer,
14:27:55 23 Mr. Zoufonoun, and Mr. Davenport, Mr. Deng described Voxer as
14:27:59 24 having good product sense; that they were long-term thinkers
14:28:04 25 that wanted to take over the space between phone-to-phone and

14:28:06 1 text messaging; that they built good technology. And he
14:28:11 2 emphasized that they had rebuilt -- they had built and rebuilt
14:28:16 3 their back end, which you heard from Mr. Ranney meant their
14:28:19 4 scalable server infrastructure.

14:28:22 5 And Mr. Deng went on to say that Voxer's systems
14:28:25 6 scaled well with their hyper growth late last year, referring
14:28:29 7 to 2011.

14:28:31 8 Now, on the very same day as that first meeting,
14:28:35 9 February 8th, 2012, from Zuckerberg replied to Mr. Deng, "I'm
14:28:40 10 not surprised the founders are smart," he wrote. The product
14:28:45 11 seems generally well done. It might be worth getting them on
14:28:48 12 board if the price is reasonable."

14:28:50 13 Now, the very next day, February 9, 2012, Mr. Deng
14:28:55 14 sent an e-mail to Sam O'Rourke, Amin Zoufonoun, and Ben
14:29:00 15 Davenport with the subject "Voxer patents." Now, you didn't
14:29:04 16 see that e-mail, but you heard Mr. Deng's testimony about it
14:29:08 17 and the fact that this e-mail confirmed that Facebook was aware
14:29:12 18 of Voxer's patents at the time, which isn't a surprise, since
14:29:17 19 Mr. Katis told everyone that he met with that that was a key
14:29:21 20 part of Voxer's business plans, to patent their live messaging
14:29:25 21 technology.

14:29:27 22 Now you also heard from Mr. Katis that, at the time
14:29:30 23 of these meetings, Voxer was seeking funding that valued Voxer
14:29:35 24 at approximately the \$200 million. And internal Facebook
14:29:39 25 documents confirmed that Facebook was aware of that valuation

14:29:42 1 at the time. And you also heard testimony yesterday from
14:29:46 2 Ms. Lawton that Houlihan Lokey had valued Voxer at around
14:29:53 3 200-million plus in 2013.

14:29:56 4 Now you also heard about a meeting that Voxer had
14:30:01 5 with Peter Deng again and Chris Daniels on March 6th, 2012 to
14:30:06 6 discuss the possible licensing of Voxer's technology. And you
14:30:10 7 heard from Mr. Katis that there were many product and
14:30:13 8 engineering people there who had questions and that the bulk of
14:30:16 9 the questions were about video uses for the technology.

14:30:20 10 And Mr. Katis explained to them that he had been
14:30:23 11 thinking about that for a long time, dating back to the
14:30:25 12 provisional that you-all saw that mentioned social networks,
14:30:29 13 and he explained the use cases for live messaging and social
14:30:34 14 media and social networks.

14:30:36 15 And you can see here in Mr. Ranney's testimony he
14:30:39 16 confirmed that there were also lots of questions about video
14:30:43 17 and, in particular, could the Voxer technology support live
14:30:45 18 messaging at Facebook's scale. And he told them, yes, it
14:30:49 19 could, that they had scaled it to the millions of people who
14:30:52 20 were now using Voxer, and that they just hadn't done it on
14:30:56 21 phones yet in part because of the technology limitations with
14:30:59 22 respect to phones then.

14:31:01 23 Now, mind you, Facebook didn't have voice for
14:31:03 24 Messenger at this time, and Facebook has brought no witness at
14:31:08 25 all to contradict any of this testimony that Mr. Ranney and

14:31:11 1 Mr. Katis offered.

14:31:13 2 Now, you also heard Mr. Katis testify about his
14:31:16 3 conversation that he had with Mr. Daniels as he left that
14:31:19 4 meeting, and that Mr. Daniels said that Facebook was trying to
14:31:23 5 decide if Voxer's technology was core and if Voxer was a
14:31:28 6 competitor. And you heard that Mr. Katis was troubled by
14:31:32 7 Mr. Daniels' remark because Mr. Katis believed that, if
14:31:36 8 Facebook determined that Voxer and his technology was core,
14:31:40 9 then Facebook would not take a license from them and would
14:31:43 10 instead build their technology in-house.

14:31:51 11 Now, you'll recall soon after this meeting, Facebook
14:31:53 12 did reach out to Voxer to say they weren't interested, after
14:31:57 13 months of productive discussions. Now, what Voxer didn't know
14:32:00 14 at the time was that Facebook internal documents showed that
14:32:03 15 Facebook had been having discussions about building a decent
14:32:06 16 version of Voxer for themselves. And, of course, you heard,
14:32:09 17 although Voxer did not know that either, that Facebook was
14:32:12 18 aware of Voxer's patents dating back to the February 9, 2012
14:32:22 19 e-mail.

14:32:22 20 Now, in August of 2015, Facebook first introduced
14:32:25 21 Facebook Live. And you heard testimony from a number of young
14:32:27 22 engineers who were involved in the roll out of that product,
14:32:31 23 and none of them had met with Voxer, and several of whom had
14:32:36 24 never met or even knew the senior Facebook executives that
14:32:38 25 Voxer had met.

14:32:39 1 But you didn't hear from anyone in management who
14:32:44 2 made the decision to pursue Facebook Live or when that decision
14:32:46 3 was even made. You certainly didn't hear from the senior folks
14:32:49 4 who had met with Voxer, like those pictured here, including
14:32:53 5 Mr. Zuckerberg and Mr. Schroepfer. None of them were here at
14:32:58 6 all. And you didn't see any documents that describe why that
14:33:01 7 decision was made or who made it.

14:33:03 8 You heard Mr. Zuckerberg was there when The Rock and
14:33:10 9 Facebook rolled out its first Facebook Live broadcast, but he
14:33:11 10 wasn't here to explain Facebook's interactions with Voxer.

14:33:18 11 Now you'll recall that Mr. Katis testified that after
14:33:22 12 Facebook Live first rolled out, it made him think of that
14:33:26 13 ominous meeting he had with Chris Daniels, where Mr. Daniels
14:33:29 14 said that Facebook was considering whether Voxer was a
14:33:31 15 competitor and whether its technology was core. And you heard
14:33:35 16 Mr. Katis testify that that was exactly what he was afraid of
14:33:39 17 when he saw Facebook Live. Facebook had rolled out a product
14:33:45 18 that to him looked like Voxer's live messaging with video.

14:33:49 19 So Mr. Katis reached out to Facebook in early 2016,
14:33:52 20 telling them that he thought that his patents, the Voxer
14:33:55 21 patents, related to Facebook Live, and he sent materials to
14:34:00 22 Facebook describing all of those patents at that time, asking
14:34:03 23 Facebook to engage in licensing discussions. But Facebook
14:34:07 24 wasn't interested.

14:34:08 25 So Voxer was compelled to file this lawsuit to

14:34:11 1 protect its patent rights, based on that bargain we talked
14:34:15 2 about that every inventor makes with the government to protect
14:34:18 3 what Mr. Ranney called "Voxer's unique technology." They
14:34:23 4 disclosed their patents and, in so doing, Voxer had done the
14:34:26 5 right thing, affording it the protection of the 20 years that
14:34:30 6 you get after your inventions are disclosed to the patent
14:34:33 7 office.

14:34:34 8 So Voxer brought this case involving those two
14:34:40 9 patents that you've heard a lot about, the '270 patent and the
14:34:43 10 '557 patent. And, as you see, the parties don't get that much
14:34:46 11 time in front of the jury to describe the nature of their case,
14:34:49 12 so the parties have to make decisions about which patents to
14:34:53 13 actually assert. And these are the two that Voxer ended up
14:34:56 14 asserting for trial.

14:34:57 15 And Voxer submits that the evidence shows that
14:35:00 16 Facebook did the wrong thing. They used Voxer's patented
14:35:07 17 technology rather than innovate. And that is all that Voxer
14:35:10 18 needs to prove, because knowledge is not needed to prove direct
14:35:12 19 infringement. So, even if Facebook never ever heard of Voxer
14:35:19 20 or any of its patents, because the evidence shows that each and
14:35:21 21 every element of the asserted claims is practiced by Facebook
14:35:27 22 and Instagram Live, they still infringe.

14:35:29 23 Now, let me walk through that evidence, the evidence
14:35:31 24 that confirms that. Now, first on the '270 patent, you heard
14:35:36 25 from Dr. Mitzenmacher each of the elements of each of the

14:35:39 1 asserted claim of the '270 patent is found in Facebook and
14:35:43 2 Instagram Live, and Voxer submits that you can find that
14:35:46 3 Facebook infringes those two patents based on
14:35:52 4 Dr. Mitzenmacher's testimony.

14:35:53 5 Now, what did defendants try to prove? Their key
14:35:56 6 noninfringement argument since the beginning of the trial has
14:35:59 7 been that they don't infringe because the '270 patent requires
14:36:05 8 guaranteed delivery. But you heard Dr. Mitzenmacher testify
14:36:07 9 that nothing in the claims of the '270 patent requires
14:36:10 10 guaranteed delivery. And you will have the claims yourselves
14:36:16 11 in the jury room, and you've been instructed that they're all
14:36:17 12 to be afforded and interpreted based on their plain and
14:36:20 13 ordinary meaning. And you'll see that nothing in the plain and
14:36:24 14 ordinary language requires guaranteed delivery.

14:36:27 15 And on cross-examination you heard Dr. Bhattacharjee
14:36:32 16 agree that the claims of the '270 patent do not require
14:36:35 17 guaranteed delivery. So that argument is dead on arrival.

14:36:39 18 Now, the defendants had another argument, that
14:36:42 19 Facebook and Instagram don't infringe because Facebook and
14:36:51 20 Instagram live don't ascertain the location of a recipient in
14:36:53 21 response to the receipt of an identifier.

14:36:55 22 But you heard Dr. Mitzenmacher testify about the
14:36:58 23 various identifiers that Facebook and Instagram Live use to
14:37:04 24 limit access to who can view live videos. And you heard
14:37:07 25 Dr. Bhattacharjee testify that he agreed that this is a role

14:37:12 1 that those identifiers played. And you also heard additional
14:37:15 2 testimony from him during cross-examination that there were
14:37:20 3 lots of other identifiers that might satisfy this claim
14:37:23 4 element, duck hunting, for example.

14:37:26 5 Now, you heard Dr. Mitzenmacher explain just
14:37:28 6 yesterday how you go from left to right in reading the series
14:37:31 7 of steps relating to this claim, and that after the recipient
14:37:40 8 identifier is received, then users -- a URL is provided only to
14:37:43 9 authorized recipients per the privacy selector, then the
14:37:47 10 recipient requests a valid URL, and the receipt IP address is
14:37:52 11 ascertained. He walked you through the chain?

14:37:55 12 Now, what the defendants are doing is claiming that,
14:37:57 13 because there are additional steps, those extra steps in the
14:38:00 14 middle there that are not claimed, there's no infringement.
14:38:05 15 But that's not the law. As the judge has already instructed
14:38:08 16 you, additional steps in a method claim cannot be pointed to to
14:38:14 17 avoid infringement. And Dr. Bhattacharjee was asked about this
14:38:19 18 during his cross-examination, and he agreed.

14:38:24 19 So because the noninfringement arguments that the
14:38:27 20 defendants have advanced are lacking, when you look at the
14:38:29 21 verdict form and the infringement question directed to the '270
14:38:35 22 patent, we ask that you please check all of the boxes for each
14:38:38 23 of the asserted claims for Facebook and Instagram Live.

14:38:42 24 Now, there is no question relating to the invalidity
14:38:44 25 of the '270 patent. You've heard that that's been dropped.

14:38:50 1 The defendants aren't even arguing this. So you'll see no
14:38:53 2 question on your verdict form for you about the '270 patent and
14:39:01 3 invalidity. The '270 patent is valid.

14:39:03 4 Now on the '577 patent. You heard from
14:39:06 5 Dr. Mitzenmacher that each of the elements of each of the
14:39:08 6 asserted claims of the '557 patent are found in Facebook and
14:39:12 7 Instagram Live. And Voxer submits that you can find that
14:39:16 8 Facebook infringes those two claims based on Dr. Mitzenmacher's
14:39:23 9 testimony.

14:39:23 10 Now, you heard from Dr. Mitzenmacher that Defendant's
14:39:25 11 only dispute concerning the '557 patent, which we've
14:39:29 12 highlighted here, was whether the selecting step took place on
14:39:35 13 the server. But you heard from Dr. Jeffay and from
14:39:38 14 Dr. Mitzenmacher that, under the plain and ordinary language of
14:39:40 15 the claim, selecting occurs either on the server or on the
14:39:44 16 client, the Facebook app. And there's no dispute that
14:39:51 17 selecting occurs.

14:39:52 18 And Dr. Jeffay admitted when he was on the stand that
14:39:54 19 discretion was not required for selecting. Instead, again, the
14:39:58 20 only question was whether or not one of the two or more
14:40:03 21 degraded versions was selected. And he also admitted that the
14:40:06 22 version was transmitted from the server to the client, just as
14:40:13 23 you see in Exhibit P-14 on the right-hand side with the arrow
14:40:16 24 sending the degraded version from the CDN to the player.

14:40:23 25 Now, you also heard Dr. Jeffay admit that, in

14:40:26 1 previous sworn testimony, he declared under oath that the
14:40:30 2 selecting step in the '557 patent could take place at the
14:40:34 3 client and, in so doing, he was acknowledging that the argument
14:40:37 4 Dr. Mitzenmacher made was correct.

14:40:41 5 So when you look at the verdict form and the
14:40:43 6 infringement question directed to the '557 patent, we ask that
14:40:46 7 you please check all of the boxes "yes" for Claims 1 and 9 for
14:40:52 8 Facebook and Instagram Live.

14:40:58 9 So, lastly, I want to talk about the other side's
14:41:00 10 invalidity for the '557 patent based on the Seckin patent
14:41:03 11 application.

14:41:04 12 And you'll recall again from the judge's instructions
14:41:06 13 that there are four sources of evidence, and one of them is
14:41:11 14 applicable presumptions. And, as you might remember from the
14:41:14 15 patent video, patents are entitled to a presumption of validity
14:41:19 16 because patents that issue have already been through the patent
14:41:22 17 office. And, like you heard in the video that the judge showed
14:41:27 18 you, the patent office works hard to evaluate patents and does
14:41:31 19 a good job making sure that patents that issue should issue.

14:41:37 20 And you heard from the judge's instructions that
14:41:39 21 Facebook has the burden of proving invalidity by clear and
14:41:42 22 convincing evidence, meaning that Facebook must present
14:41:46 23 evidence that leaves you with a firm belief or conviction that
14:41:50 24 it is highly probable that the factual contentions of the claim
14:41:55 25 or defense are true. And Voxer submits that Facebook cannot

14:41:59 1 meet this heightened burden, and if you have any lingering
14:42:02 2 doubts, the presumption must stand.

14:42:07 3 Now, you heard Dr. Jeffay testify about the Seckin
14:42:09 4 patent application, and on cross he said he didn't consider
14:42:13 5 whether or not it had actually matured into a patent. And then
14:42:17 6 you heard Dr. Mitzenmacher yesterday say that it had not, and
14:42:21 7 that was actually something relevant to consider about how
14:42:24 8 strong this prior art was.

14:42:26 9 And you heard Dr. Mitzenmacher explain that Seckin
14:42:32 10 does not invalidate the '557 patent because, unlike the video
14:42:37 11 message service infrastructure required by that patent,
14:42:41 12 Seckin's patent was only a one-way broadcast video message
14:42:45 13 service. It was not bidirectional like live messaging, Voxer's
14:42:50 14 invention, requires. By contrast, you did hear
14:42:55 15 Dr. Mitzenmacher testify that the '557 patent does disclose
14:43:02 16 bidirectional messaging, which is required.

14:43:05 17 Now, Dr. Jeffay did not dispute that Seckin's end
14:43:09 18 users cannot send messages to each other and acknowledged, in
14:43:15 19 essence, that it was unidirectional. And based on that, Voxer
14:43:19 20 submits that it doesn't invalidate the '557 patent.

14:43:23 21 Now, finally with respect to Claim 9, you heard from
14:43:27 22 Dr. Mitzenmacher that Seckin additionally fails to meet this
14:43:31 23 element because it requires a second real-time streaming
14:43:34 24 protocol. And that's another reason for you to reject the
14:43:39 25 invalidity argument advanced by Facebook.

14:43:42 1 So, because Defendants have not met the burden of
14:43:46 2 clear and convincing evidence on this point, they cannot
14:43:49 3 overcome the presumption that the '557 patent is valid. And we
14:43:54 4 would ask you to check the boxes "no" on the verdict form
14:43:57 5 relating to the '557 patent invalidity question.

14:44:01 6 And now I'm going to turn over the mic to my
14:44:04 7 colleague, Mike Powell, who will be addressing damages and our
14:44:07 8 rebuttal case. And since this will be the last time that I get
14:44:11 9 to address you directly, I just want to say thank you again for
14:44:14 10 your time.

14:44:30 11 MR. POWELL: Thank you, Robert.

14:44:31 12 May it please the Court:

14:44:32 13 Good afternoon. You know, today is a special day for
14:44:37 14 me. Not only do I get the pleasure of presenting closing
14:44:41 15 arguments to you today, but it's also my 25th wedding
14:44:44 16 anniversary to my beautiful wife, who also happens to be a
14:44:48 17 lawyer. We have so much to be thankful for, especially our
14:44:52 18 three healthy and happy children.

14:44:53 19 You know, I have sure enjoyed being with you-all here
14:44:56 20 in Austin this last week and a little bit extra, and I want you
14:45:00 21 to know before I begin that I, my client Voxer, the whole team
14:45:05 22 here, we've been looking forward to this day for a long, long
14:45:10 23 time. So we appreciate your attention.

14:45:19 24 Now, you'll recall Dr. Ratliff's testimony a few days
14:45:22 25 ago, and it's my pleasure to summarize Voxer's damages claims

14:45:26 1 for infringement of the '270 and the '557 patents. And,
14:45:32 2 frankly, Facebook and Instagram have made my job a lot easier
14:45:35 3 by electing not to present their own damages expert, an
14:45:38 4 opinion.

14:45:39 5 Instead, they chose to bring Ms. Kathy Lawton here
14:45:42 6 yesterday simply to nitpick and criticize Mr. Ratliff for not
14:45:47 7 doing things her way. But, of course, there was no "her way"
14:45:50 8 because she had to admit on cross-examination that she had not
14:45:57 9 given us a reasonable royalty. She had not done the work to
14:46:01 10 explain the hypothetical negotiation that is required by the
14:46:07 11 law as you were instructed just a few moments ago.

14:46:12 12 Now, you will recall Mr. Ratliff explaining the
14:46:16 13 *Georgia-Pacific* factors, and Your Honor instructed you on the
14:46:22 14 *Georgia-Pacific* factors just a few moments ago. Now, you have
14:46:26 15 to have the facts of the case fit within the *Georgia-Pacific*
14:46:32 16 factors. And Mr. Ratliff gave you five groups of those
14:46:37 17 factors, and he walked you through each group identifying for
14:46:41 18 you the evidence which either supported Voxer's case or not.

14:46:49 19 Now, recall the judge did instruct you that damages
14:46:52 20 must be apportioned. Dr. Mitzenmacher and Mr. Ratliff did
14:46:57 21 their required apportionment, but neither of Drs. Jeffay or
14:47:04 22 Bhattacharjee, nor Ms. Lawton, did any apportionment
14:47:06 23 whatsoever.

14:47:07 24 And you know who else did not do apportionment:
14:47:11 25 Houlihan Lokey. You'll recall Houlihan Lokey was presented by

14:47:15 1 the defense as another example of a licensing transaction that
14:47:19 2 you could consider in evaluating damages.

14:47:22 3 Now, you see while Ms. Lawton talked about the
14:47:24 4 Houlihan Lokey report, that report was prepared in June of
14:47:28 5 2017. The hypothetical negotiation, as you have been
14:47:33 6 instructed by the judge, is deemed to take place in
14:47:35 7 November 2018, over a year later.

14:47:40 8 So, as we will see, while the Houlihan Lokey report
14:47:45 9 had patent license valuations that overwhelmingly support
14:47:49 10 Mr. Ratliff, had Voxer tried to present those valuations to
14:47:53 11 you, the jury, you can be sure that Facebook would have been
14:47:56 12 objecting. They would have objected that those valuations are
14:47:59 13 irrelevant and should not be considered because they do not
14:48:02 14 reflect the hypothetical negotiation. But you don't hear Voxer
14:48:09 15 object. Voxer believes you, the jury, should have all the
14:48:12 16 evidence to consider.

14:48:15 17 But since Facebook and Ms. Lawton opened that door in
14:48:18 18 trial, those Houlihan Lokey valuations, the relevant ones, the
14:48:22 19 ones that are based on a running royalty of the type that the
14:48:26 20 evidence urges you to use here, those applied to -- the ones
14:48:32 21 that were apples to apples, if you were. You may recall I used
14:48:35 22 that terminology. Well, those show a different story. Those
14:48:39 23 Houlihan Lokey valuations offer bookends to the reasonable
14:48:43 24 royalty range in this case and put Mr. Ratliff's reasonable
14:48:46 25 royalty smack dab in the middle.

14:48:50 1 Now, you'll recall this stream -- slide from
14:48:54 2 Mr. Ratliff's examination. And there was additional testimony
14:48:58 3 and evidence admitted during trial that can also be considered
14:49:02 4 as what I might call a "gut check," evidence of Facebook's own
14:49:06 5 internal actual revenue data and its projections. Now,
14:49:10 6 remember, the Facebook in-stream flywheel that Mr. Ratliff took
14:49:14 7 time to discuss with you, nobody can dispute -- nobody can
14:49:20 8 dispute time on Facebook's services means more money to
14:49:24 9 Facebook. That was why Mr. Ratliff walked you through the
14:49:28 10 in-stream flywheel.

14:49:30 11 And Ms. Lawton had to agree with me on that point in
14:49:33 12 cross-examination. Of course, Ms. Lawton also said it is not a
14:49:37 13 concern that Houlihan Lokey had relied on projections instead
14:49:41 14 of Facebook's actual revenue information.

14:49:46 15 Well, Mr. Ratliff told you last week that he did look
14:49:49 16 at Facebook's specifically tracked Facebook Live revenues.
14:49:54 17 They were over 1.4 billion. That is the number Facebook's
14:49:58 18 Mr. Poffenberger said he did not have handy during my
14:50:02 19 cross-examination when he said he had only looked at numbers
14:50:05 20 through June of 2021.

14:50:08 21 And then on cross-examination of Mr. Poffenberger,
14:50:12 22 despite Facebook's objection, I was able to introduce
14:50:15 23 Plaintiff's Exhibit P-704. Remember the rocket ship and
14:50:19 24 Facebook's target of 100 million watch hours which they hit way
14:50:24 25 ahead of schedule in March 2020 because of the pandemic

14:50:28 1 lockdowns. We heard from Mr. Ratliff, and we saw on Facebook's
14:50:31 2 own words, they protected -- they projected internally to 5X
14:50:36 3 these numbers by 2023, which is just three short months from
14:50:41 4 today.

14:50:43 5 So simple math tells us that 5 times 362 million is
14:50:48 6 \$1.81 billion in revenue specifically tracked to the Facebook
14:50:51 7 Live accused functionality.

14:50:55 8 So when -- so when we use this specifically tracked
14:51:00 9 revenue using Facebook's own numbers and plug it into
14:51:03 10 Mr. Ratliff's formula, this time eliminating the downward
14:51:07 11 adjustment step of technical apportionment, because this is
14:51:11 12 directly tracked revenue that is directly tied to the accused
14:51:15 13 Facebook Live functionality, and also eliminating the upward
14:51:18 14 adjustment for the was live derivative sales, since that is not
14:51:22 15 relevant if we are talking about specifically tracked revenue,
14:51:26 16 we get a reasonable royalty of 183 million on the low side
14:51:30 17 using actual numbers and 234 million on the high side using the
14:51:35 18 projected numbers.

14:51:38 19 By the way, ladies and gentlemen, this is precisely
14:51:41 20 why Mr. Ratliff's reasonable royalty got bigger after several
14:51:45 21 client application patents were voluntarily withdrawn by Voxer
14:51:50 22 before trial so that it could focus on the server patents and
14:51:53 23 have sufficient time with you to make its case.

14:51:55 24 You see, if Mr. Ratliff adjusted his reasonable
14:51:58 25 royalty downward to account for the client application patents

14:52:02 1 being withdrawn, he had to make an adjustment upward because
14:52:07 2 this trial was delayed nine months due to scheduling conflicts
14:52:11 3 at the court. Now, when Mr. Ratliff added in the royalty for
14:52:16 4 that period of time, the number actually got bigger despite the
14:52:19 5 reduction in the royalty rate from the client application
14:52:23 6 patents dropping out of his analysis.

14:52:28 7 Now, of course, Ms. Lawton denied this, but the
14:52:30 8 evidence shows Ms. Lawton was simply wrong, which makes sense,
14:52:34 9 since she didn't bother to consult the book of wisdom she
14:52:37 10 talked about on this point and her client's corporate
14:52:39 11 representative, Mr. Poffenberger, refused to look at revenue
14:52:43 12 past June 2021, more than a year ago now.

14:52:46 13 So that brings us back full circle. Mr. Ratliff has
14:52:50 14 offered the only reasonable royalty calculation that meets the
14:52:53 15 legal requirements you were just instructed on. And in view of
14:52:58 16 this, ladies and gentlemen, Voxer asks that you find Facebook
14:53:01 17 and Instagram infringed the '270 and '557 patents; that the
14:53:06 18 '557 patent is valid; that in response to the question, "What
14:53:09 19 damages do you find?" please write in "\$175 million," and check
14:53:15 20 the box running royalty since these patents continue until
14:53:19 21 2028.

14:53:20 22 Thank you.

14:53:22 23 THE COURT: Ladies and gentlemen, at this time we'll
14:53:25 24 take a brief recess before we finish the arguments. We'll be
14:53:28 25 in recess for 15 minutes.

14:53:30 1 (Jury recessed)

14:54:06 2 THE COURT: This always happens. It doesn't matter
14:54:08 3 how many eyes go over these things, whether it's all of my
14:54:11 4 staff and all of you, as I was reading the jury charge and the
14:54:14 5 verdict form, I found a couple of mistakes and perhaps you do,
14:54:23 6 too. We will get these corrected in the finals that go to the
14:54:26 7 jury.

14:54:27 8 On page 3 of your jury charge in the first line, the
14:54:31 9 word "party" should be "part." And in part B, the next to last
14:54:38 10 line of the paragraph, "significant" should have been
14:54:42 11 "significance." And the verdict form on the last page in the
14:54:50 12 second line, "accurate" should be "accurately."

14:54:53 13 So we're going to correct those pages and we'll just
14:54:56 14 get corrected pages to you instead of doing the whole thing.
14:55:00 15 And then what will go to the jury will have those done.

14:55:04 16 So at this time we'll be in recess for 15 minutes.

14:55:08 17 (Recess)

15:13:27 18 (Open court, jury present)

15:13:27 19 THE COURT: Mr. Van Nest, the defendants may present
15:13:29 20 closing argument.

15:13:30 21 **DEFENDANT'S CLOSING ARGUMENT**

15:13:30 22 MR. VAN NEST: Thank you, Your Honor, and good
15:13:31 23 afternoon, ladies and gentlemen. Bob Van Nest here again for
15:13:34 24 Facebook.

15:13:35 25 Thank you again for your jury service. You've be

15:13:38 1 very attentive group. We've all been noticing the note-taking,
15:13:42 2 and we appreciate that very much. And I want to begin by
15:13:45 3 saying, whatever verdict you reach, thank you on behalf of
15:13:48 4 Facebook for your service as jurors.

15:13:50 5 Now, I want to get right into the evidence. The
15:13:56 6 testimony of these Facebook engineers -- and they're the ones
15:14:00 7 who built and maintain Facebook Live and Instagram Live -- was
15:14:03 8 clear, it was detailed, and it was completely unchallenged by
15:14:07 9 Voxer and its lawyers.

15:14:09 10 Dave Capra and Abhishek Mathur led the development
15:14:14 11 team, and they told you where the idea for Facebook Live came
15:14:17 12 from, how they built the product, and what technology they
15:14:20 13 used. Nothing was copied from Voxer. The Facebook engineers
15:14:24 14 did their own work. That was undisputed testimony, not
15:14:28 15 challenged by the Voxer lawyers.

15:14:30 16 And the testimony of these engineers also proves
15:14:34 17 there's no infringement of either one of these patents, and
15:14:37 18 we're going to focus our discussion this afternoon on
15:14:40 19 infringement, because that's a really key issue in this case.
15:14:44 20 You didn't hear much about it in Voxer's opening.

15:14:47 21 The '270 patent requires using and receiving an
15:14:52 22 identifier that identifies a recipient of the video and using
15:14:57 23 that to ascertain a location for delivery of the video. The
15:15:02 24 Facebook and Instagram Live privacy settings, which is what
15:15:07 25 they accuse of infringement, only establish who is eligible to

15:15:11 1 receive a video, not who is going to receive a copy of one.

15:15:16 2 It's a broadcast system, not a messaging system.

15:15:20 3 There's no inbox for a Facebook Live video. You
15:15:25 4 heard that testimony from Mr. Leland. And the location for
15:15:29 5 delivering the video is not ascertained upon receiving any
15:15:33 6 privacy setting. It's only known when the user or the user's
15:15:37 7 device requests the video. It's a pull system. That is
15:15:42 8 ascertained not based on any identifier, no privacy selector.
15:15:48 9 The privacy selectors have nothing to do with that.

15:15:51 10 And the '557 patent isn't infringed either because
15:15:55 11 the Facebook engineers, they confirmed and it's undisputed now,
15:16:00 12 that it's the client device -- the phone, your laptop -- not
15:16:04 13 the Facebook servers, that select the version of the video to
15:16:08 14 send. They're the ones that make -- the client devices are the
15:16:13 15 ones that make the all-important selection, and so there's no
15:16:15 16 infringement of the '557 patent either because the
15:16:20 17 infrastructure, the Facebook servers, don't make that selection
15:16:24 18 and so they don't perform that critical step.

15:16:28 19 And, as I said in the opening, Voxer's technology
15:16:32 20 just wasn't right for the industry. No one has taken a license
15:16:35 21 to it whatsoever. Ms. Anderson is going to discuss that aspect
15:16:41 22 of the evidence once I finish. She's going to talk to you
15:16:44 23 about the damage claim that Voxer's made and how inconsistent
15:16:49 24 it is with all of the evidence that you've heard about the
15:16:52 25 market.

15:16:52 1 So here's our key points of evidence. They haven't
15:16:56 2 changed since we started. The Voxer engineers -- excuse me.
15:17:00 3 The Facebook engineers built Facebook Live. They used their
15:17:03 4 own technology. The technology is very different,
15:17:07 5 fundamentally different, from what's in Voxer's patents.

15:17:11 6 Now, Mr. Mathur went through this. They started
15:17:14 7 Facebook Live, Coding Under the Stars. They developed it
15:17:19 8 themselves. It took almost a year to build it, of hard,
15:17:22 9 detailed engineering work. And Mr. Mathur explained where it
15:17:26 10 came from. Some of it was new code that they wrote, some of it
15:17:30 11 with was from Facebook's existing video, and some was from
15:17:33 12 open-source software that existed in the market.

15:17:36 13 Nothing was copied from Voxer. They did their own
15:17:40 14 independent work. And you heard Mr. Mathur tell you that he
15:17:44 15 never even heard of Voxer.

15:17:46 16 "In all of your work on building Facebook Live, did
15:17:49 17 the subject of Voxer ever come up?"

15:17:51 18 "No."

15:17:52 19 "Was there any mention of Voxer patents that you
15:17:54 20 personally heard of?"

15:17:56 21 "No."

15:17:56 22 Same thing for Mr. Capra. No mention of Voxer, no
15:18:02 23 use of any Voxer technology.

15:18:04 24 Now, let me briefly touch on this. I'm not sure why
15:18:10 25 they spent so much time talking about 2012. 2012 has

15:18:15 1 absolutely nothing to do with what you guys have been asked to
15:18:19 2 decide. 2012 was two years before -- three years before the
15:18:25 3 launch of Facebook Live, and it was five years before either of
15:18:28 4 these patents was even applied for, and it had nothing to do
15:18:33 5 with video. They were talking about VoIP, their walkie-talkie
15:18:39 6 patent, voice over the Internet.

15:18:41 7 This is the e-mail you saw in the opening. You saw
15:18:44 8 it again during the course of the case. It confirms that all
15:18:49 9 these folks were talking about was voice over the Internet.
15:18:51 10 And the Messenger app that you heard, it's not accused of
15:18:55 11 infringement. It's a messaging service that Facebook makes
15:18:57 12 available with voice mail. It's not a video product. It's not
15:19:01 13 a part of the case.

15:19:01 14 And this was all confirmed by Mr. Davenport, who
15:19:06 15 testified by video last week. "What we wanted was the ability
15:19:09 16 to run on background, which required VoIP status." So the 2012
15:19:16 17 discussions we heard so much about have nothing to do with what
15:19:22 18 you are being asked to decide.

15:19:23 19 All right. Let's get right into infringement. The
15:19:26 20 '270 patent, no infringement. Here's the jury instruction.
15:19:32 21 This is from page 11 of the instructions that Judge Yeakel read
15:19:35 22 you, and it just confirms what I told you in the opening.

15:19:38 23 Each and every one of the requirements of the
15:19:40 24 asserted claim has to be present in the Facebook and Instagram
15:19:44 25 Live products. Every single element has to be there. That was

15:19:48 1 the whole point of the soccer ball and the football. Three out
15:19:54 2 of four, not good enough; five out of six, not good enough.

15:19:58 3 All right. Here are the elements where we start with
15:20:01 4 the '270, the elements of Claim 34, and there are two critical
15:20:04 5 requirements that are not performed by the Facebook servers,
15:20:07 6 and the evidence on that is essentially undisputed at this
15:20:11 7 point.

15:20:11 8 The two questions you have to answer on '270 are:
15:20:15 9 One, are the privacy settings, because that's what they accuse
15:20:21 10 as the recipient identifier -- are the privacy settings in
15:20:24 11 Facebook and Instagram Live or Instagram Direct a recipient
15:20:28 12 identifier that identifies a recipient of the video?

15:20:31 13 Question 2. Do the Facebook and Instagram Live
15:20:35 14 ascertain a location to deliver the video in response to
15:20:39 15 receipt of a recipient identifier?

15:20:42 16 Now, these are each independent requirements. If the
15:20:45 17 answer to either one of these is no, there's no infringement.
15:20:49 18 Either one of these. And, in fact, the answer to both of them
15:20:53 19 is no, because here's the claim language.

15:20:57 20 The '270 patent requires receiving an identifier
15:21:01 21 transmitted by the sending device -- that's the person that
15:21:04 22 wants to broadcast, the broadcaster -- with an identifier
15:21:10 23 identifying a recipient of a video communication. Here's the
15:21:13 24 key point. It's not good enough that somebody down the line
15:21:17 25 that's part of a group or part of the public decides to ask

15:21:22 1 for, request, and watch the video. The patent requires that,
15:21:25 2 when the video is received from the broadcaster, there be some
15:21:29 3 kind of an identifier, a recipient identifier, that identifies
15:21:34 4 who is going to receive -- who is going to receive the video.

15:21:40 5 Now, Dr. Bhattacharjee illustrated this in this
15:21:44 6 animation. This is an illustration of how '270 works. We have
15:21:48 7 our sending broadcaster on the left. She's going to send, and
15:21:51 8 she chooses recipients, Sue, Alice, and Mike, and she sends
15:21:58 9 that video with the recipients -- I'm going to show it again --
15:22:01 10 over to the server.

15:22:02 11 When the server gets it, it then determines after
15:22:06 12 receiving it, what are the addresses? What is the location to
15:22:11 13 which we're going to deliver the video? And once the addresses
15:22:14 14 are determined, then the system delivers the video.
15:22:17 15 That's the point of having a recipient identifier.

15:22:21 16 Now, this is absolutely consistent with what the
15:22:24 17 patent describes. This is an important passage. It's at
15:22:29 18 column 22 of the patent. I encourage you guys to read it.
15:22:33 19 It says: "When a client transmits a message, the message
15:22:37 20 contains an identifier associated with the target recipient."
15:22:41 21 This is not an embodiment. This is the only place in the
15:22:45 22 patent that describes this identifier, this all-important
15:22:48 23 identifier. This is it. And that's what it says.

15:22:50 24 So the message contains an identifier associated with
15:22:53 25 a target recipient. And what happens next? In response, the

15:22:57 1 server finds a delivery route to a client associated with the
15:23:01 2 intended or targeted recipient.

15:23:03 3 Now, let's clear out one red herring right up front.
15:23:07 4 There is no requirement in Claim 34 of a guaranteed delivery,
15:23:14 5 because you can never guarantee delivery. And we're not
15:23:17 6 arguing it because sometimes there are glitches or problems
15:23:18 7 with delivery. That's not -- no. That's not it, and that's
15:23:22 8 never a position that we took or that Dr. Bhattacharjee took.

15:23:27 9 You read the claims in light of the specification.
15:23:32 10 The point of this patent is to provide a messaging system where
15:23:38 11 you make your best effort to get something delivered to a
15:23:40 12 targeted recipient, just like the patent here says.

15:23:43 13 So the point isn't that there's no -- that there's no
15:23:47 14 guarantee in Facebook Live. The point is there is no recipient
15:23:50 15 identifier because it's a broadcast system.

15:23:53 16 Here is what Voxer accuses of being a recipient
15:23:57 17 identifier. They say the privacy selector there on the left
15:24:01 18 for Facebook Live and the privacy selector for Instagram Live
15:24:06 19 are the recipient. They say those are identifying receipts.
15:24:10 20 But in these systems you now know these do not identify who is
15:24:15 21 going to receive it. All they do is determine who is eligible.

15:24:23 22 If it's a public setting, everybody in the world is
15:24:25 23 eligible. Obviously, they're not all being sent a video. And
15:24:29 24 if it's a private setting, it's a group of people, but they're
15:24:30 25 not the recipients until they make a specific request to see

15:24:38 1 the video. So these only determine eligibility, they do not
15:24:40 2 determine a recipient.

15:24:45 3 Now, here's how Dr. Bhattacharjee described the
15:24:48 4 system, and the engineers are absolutely consistent with this:
15:24:51 5 It's a broadcast system that does not use a recipient
15:24:55 6 identifier. There's our sender. He's going to broadcast a
15:25:02 7 live soccer game. He sends his -- his broadcast, he sends his
15:25:06 8 video to the servers. There are privacy selectors, but they
15:25:11 9 don't determine where it's going to go. They don't determine,
15:25:14 10 they don't identify a recipient, because this is broadcast.
15:25:25 11 And in order to receive it, somebody has to see it on their
15:25:25 12 feed or wherever they see it or whatever notification, and they
15:25:28 13 have to make a specific request. It's a pull system.

15:25:31 14 You heard about this HTTP request. Only then -- only
15:25:36 15 then do the servers know what is the delivery address, because
15:25:40 16 the servers look at the address provided by the sender --
15:25:45 17 excuse me -- by the user and they send it back.

15:25:55 18 So, again, the privacy settings are not used, as
15:25:57 19 we'll see in just a minute, to determine a recipient and
15:25:58 20 they're not used to determine a location. This is the way
15:26:03 21 Dr. Bhattacharjee described it.

15:26:05 22 He was asked: "In your opinion, does setting the
15:26:07 23 privacy to a Facebook Live video to any of these options
15:26:14 24 identify a recipient?"

15:26:14 25 "No."

15:26:15 1 Why not? Because the privacy selector only serves to
15:26:19 2 restrict who may view it. In order for the video to be
15:26:27 3 actually watched, for somebody to receive it, to become a
15:26:28 4 recipient, an eligible viewer must send a request and pull the
15:26:31 5 video. And the privacy selector, the privacy settings in
15:26:35 6 Facebook Live and Instagram Live, tell us nothing about who
15:26:37 7 does that.

15:26:42 8 Now, the testimony from the engineers on this was
15:26:45 9 unequivocal. Here's Mr. Leland.

15:26:46 10 "Does the privacy selector enable broadcasters to
15:26:47 11 determine who will ultimately get a copy of a Facebook Live
15:26:50 12 video?

15:26:53 13 "No."

15:26:53 14 "What does it do?"

15:26:55 15 "It allows the broadcaster to specify if they want to
15:26:57 16 restrict access to a group, who should the access be limited
15:27:00 17 to."

15:27:00 18 Most -- as Mr. Leland testified, most of these are
15:27:04 19 set public, so the whole world, anybody, online can have it.
15:27:08 20 Again, we asked him another question:

15:27:10 21 "Does Facebook allow broadcasters to dictate the
15:27:13 22 people to whom Facebook will actually send the video?"

15:27:16 23 "No."

15:27:16 24 "Why can't broadcasters specify who the video will be
15:27:21 25 sent to?"

15:27:22 1 "Facebook does not provide an interface to do that."
15:27:24 2 That is undisputed, unchallenged testimony that there
15:27:30 3 is no recipient identifier in the Facebook Live system. That's
15:27:33 4 what he's saying.

15:27:34 5 Does Facebook Live have anything like an inbox?
15:27:38 6 Dr. Mitzenmacher kept talking about e-mails that you get. You
15:27:41 7 can get an e-mail and not open it. That's not what we're
15:27:44 8 talking about. Someone can send you an e-mail that you don't
15:27:53 9 get. That's not what we're talking about.

15:27:53 10 In Facebook Live and Instagram Live, nothing is sent
15:27:55 11 until and unless the user device or the user asks for it and
15:28:00 12 requests it. That is fundamentally different from what the
15:28:02 13 patent requires.

15:28:08 14 Now, the same is true from Instagram. Here's
15:28:12 15 Mr. Stinson. You heard from him last week.

15:28:13 16 "Which of these settings" -- this is public and
15:28:15 17 private now for Instagram.

15:28:16 18 "Which of these settings enables broadcasters to
15:28:19 19 determine who will request and view their live video?"

15:28:22 20 "Neither of these settings allow a broadcaster to do
15:28:24 21 that. To receive a live video, it requires an explicit action
15:28:28 22 on the part of the viewer which the broadcaster would have no
15:28:31 23 control over."

15:28:32 24 Again, these are broadcast systems. They are not
15:28:41 25 messaging systems using identifiers. That's true even if

15:28:44 1 you're talking about Instagram Direct. That's the little paper
15:28:50 2 airplane that was discussed by Dr. Mitzenmacher.

15:28:56 3 We asked Mr. Stinson, What happens if you're using
15:28:59 4 Instagram Direct? If you use it, is the live video itself sent
15:29:04 5 to the user? No, it's not. The live video is not sent. What
15:29:10 6 is sent at that point is an entry point. The user or the
15:29:20 7 user's device still has to request it. There's no recipient
15:29:21 8 identified even in Instagram Direct.

15:29:23 9 Does the Instagram Direct feature control who
15:29:26 10 ultimately ends up receiving an Instagram Direct video? No.
15:29:30 11 It can't control who receives it because it can't control who
15:29:33 12 will actually tap on it.

15:29:37 13 There's one other thing that's important about
15:29:40 14 Instagram Live that's different from Facebook Live. In
15:29:44 15 Instagram Live, the settings, as you heard from
15:29:46 16 Dr. Mitzenmacher and everybody else, they're default settings.
15:29:49 17 They apply to all your content, not just your video. So the
15:29:53 18 patent requires that the message be associated with the -- that
15:29:57 19 the identifier be associated with a video message. That is
15:30:00 20 not -- that never happens on Instagram Live because these are
15:30:04 21 default settings that apply to everything -- posts, texts,
15:30:09 22 everything you send -- not just live videos.

15:30:15 23 Now, the privacy settings aren't equivalent. We may
15:30:19 24 hear on the rebuttal about equivalents because Dr. Mitzenmacher
15:30:22 25 talked about it. But they're not equivalents. A privacy

15:30:28 1 setting is fundamentally different from this claim recipient
15:30:30 2 identifier. The patent requires that you will identify those
15:30:35 3 who will receive the video. That's the function that they're
15:30:38 4 talking about, and it results in reliable delivery to intended
15:30:42 5 recipients.

15:30:44 6 The Facebook privacy settings do not perform that
15:30:47 7 function, and they don't receive that result. They only define
15:30:50 8 who is eligible to request it. Eligibility is different from
15:30:55 9 being a recipient, and it results only in providing access, not
15:31:05 10 determining a recipient.

15:31:06 11 Now, there's a second question equally important on
15:31:08 12 '270. And if either one of these is answered in the negative,
15:31:13 13 there's no infringement. Do Facebook and Instagram Live
15:31:16 14 ascertain a location used to deliver the video in response to
15:31:20 15 receipt of the recipient identifier?

15:31:22 16 We are not talking about an extra step, which is what
15:31:26 17 Dr. Mitzenmacher wants to talk about. This is a fundamentally
15:31:30 18 different step and a fundamentally different approach. Let's
15:31:33 19 look at the claim because we start with the language of the
15:31:36 20 claim.

15:31:36 21 The claim requires ascertaining the location in
15:31:41 22 response to receipt of the identifier. So what they're
15:31:44 23 claiming is that, in response to the privacy setting, the
15:31:49 24 Facebook and Instagram Live systems determine where to send the
15:31:56 25 video. And we know that that is not true. The Facebook and

15:31:59 1 Instagram Live servers have no idea where to send a video when
15:32:04 2 they get the privacy setting.

15:32:06 3 Why? Because it's a broadcast system. The message
15:32:10 4 is broadcast everywhere. It isn't until a user or user's
15:32:14 5 device makes a specific request from a specific device that
15:32:20 6 Facebook's servers know where to send it. You heard the
15:32:22 7 testimony about the fact that your IP address can change, are
15:32:28 8 you on Wi-Fi, are you on cell, are you in a coffee shop, are
15:32:31 9 you at home. You move around with your phone or your tablet,
15:32:33 10 you're on different networks and different IP addresses.

15:32:37 11 So when the servers receive the privacy setting and
15:32:41 12 the original video broadcast, they don't know where to send it.
15:32:44 13 They need to have a request. And this is critical, and the
15:32:48 14 testimony on this from Mr. Larumbe, who testified last week,
15:32:52 15 was undisputed.

15:32:53 16 "Does the CDN" -- the CDN is the Facebook server, the
15:32:59 17 content deliver network. That's servers.

15:33:01 18 "Does the CDN ever receive any information regarding
15:33:04 19 where to send the video based on the broadcaster's privacy
15:33:08 20 settings?

15:33:09 21 "No, it doesn't."

15:33:09 22 "Do the privacy settings have any connection to the
15:33:12 23 server at all?"

15:33:13 24 "No. They are completely independent systems."

15:33:18 25 In other words, it's not an extra step, it's a

15:33:21 1 different step that has nothing to do with the privacy
15:33:23 2 settings. The servers don't know where to send a video until a
15:33:28 3 user makes a request, and that's not what the patent requires.

15:33:31 4 This is a slide shown last week by Dr. Mitzenmacher
15:33:38 5 from one of our engineers just confirming that the only way
15:33:42 6 Facebook Live and Instagram Live ever know where to send a
15:33:46 7 video is when the user or the user's device makes an HTTP
15:33:51 8 request that has an IP address in it and they send it back.

15:33:56 9 Dr. Mitzenmacher's on board with this, too. I asked
15:33:59 10 him on cross: "Based on your review of all this material, you
15:34:04 11 concluded that Facebook Live and Instagram Live use technology
15:34:08 12 typically thought of as a pull system, where client devices
15:34:12 13 make requests to servers which the servers respond to?"

15:34:16 14 "That's part of the technology. The players will
15:34:20 15 make requests."

15:34:21 16 The IP address changes, so the servers wait until
15:34:27 17 there's a request from your phone or your tablet to receive it.

15:34:35 18 And these things aren't equivalent either. There's a
15:34:39 19 fundamental difference between ascertaining a location when you
15:34:42 20 get the privacy setting and only determining the location later
15:34:48 21 when the user, whoever he or she is, makes a request. It's
15:34:53 22 done in a different way, it produces a different result, it's
15:34:56 23 fundamentally different. So there's no equivalence.

15:34:59 24 And that means, that both of these two issues -- the
15:35:05 25 evidence shows that on both of these issues, the Facebook

15:35:10 1 servers don't perform the step required by Claim 34 and,
15:35:15 2 therefore, there is no infringement.

15:35:18 3 Voxer has the burden of proving infringement. They
15:35:21 4 didn't do it. They didn't do it. They didn't show that
15:35:25 5 there's a user identifier -- a recipient identifier, and they
15:35:29 6 didn't show that the location to send the video is ascertained
15:35:33 7 in response to the privacy settings.

15:35:35 8 Let's talk about the '557 patent, and we're going to
15:35:40 9 get into some detail on that, too, because, again, the only
15:35:44 10 issue for you as jurors is to resolve this infringement
15:35:47 11 question. And we'll talk about validity on '557 in a minute.

15:35:51 12 Here are the claims. We start with the claims.

15:35:57 13 This claim claims a method for operating a video
15:36:02 14 message service infrastructure, and the steps are laid out.
15:36:07 15 And, yes, Voxer is right: We're only contesting the selecting
15:36:11 16 step. But it is now established in the evidence that the
15:36:15 17 selecting step is not performed by the servers. You heard
15:36:19 18 Voxer's lawyers refer to these as the server patents. These
15:36:22 19 patents are being read, or attempted to be, on the Facebook
15:36:27 20 servers. They're all about the servers.

15:36:30 21 What's the issue on '557? Do the Facebook servers
15:36:35 22 perform the step of selecting a version of the video based on
15:36:39 23 an ascertained bandwidth on the network? Is that done by the
15:36:43 24 servers, or is it done somewhere else? Well, this isn't a hard
15:36:48 25 one. Let's start with the language of the claim.

15:36:55 1 It's a method for operating a video message service
15:36:58 2 infrastructure. That's what the claim is about. And it
15:37:01 3 requires that the video message service infrastructure, which
15:37:04 4 they claim is the server, selects one of the degraded versions
15:37:07 5 of the video media based on ascertained bandwidth.

15:37:11 6 This is the patent that talks about selecting a
15:37:14 7 version based on your Internet bandwidth. You've got great
15:37:19 8 bandwidth, you can get a great resolution version of the video.
15:37:22 9 If your bandwidth is terrible, well, you'll have to suffer
15:37:25 10 something a little fuzzier. We've all been through that.

15:37:28 11 Well, Dr. Mitzenmacher was crystal clear. This is
15:37:31 12 his drawing that he put up last week, and he's done a labeling
15:37:34 13 for us. In his view the video message service infrastructure
15:37:39 14 is limited to the Facebook servers in the orange box. On the
15:37:43 15 right, the player, that's the client device. That's your
15:37:46 16 phone, your tablet, your laptop. They are two separate things.

15:37:51 17 The Facebook -- the video message service
15:37:54 18 infrastructure, according to Dr. Mitzenmacher, is the Facebook
15:37:58 19 Live servers, FBLS, right in the middle of the orange box. And
15:38:04 20 he has the client, which is the player -- that's you or me or
15:38:09 21 anybody that's going to play the video -- on the right.

15:38:12 22 And you know what? The patent requires that these be
15:38:16 23 separate things, because one of the claims -- one of the
15:38:20 24 elements of this very claim requires transmitting the actual
15:38:25 25 selected version from the video message service infrastructure

15:38:29 1 to a recipient device. So the claim requires that they be
15:38:33 2 separate, that the infrastructure be one thing and that the --
15:38:39 3 that the client be another thing.

15:38:41 4 And so the issue is: Do the servers provide this
15:38:45 5 selection, or is it done by the client device? Well, again,
15:38:52 6 the testimony of the engineers from Facebook was absolutely
15:38:58 7 undisputed on this point.

15:39:00 8 We asked Mr. Larumbe: "What role does the CDN" --
15:39:04 9 that's the Facebook server. "what role does it play in
15:39:06 10 deciding which version of a video to deliver?"

15:39:09 11 "It doesn't play any role."

15:39:11 12 The viewer device selects and then specifies the
15:39:14 13 specific file name. And then the CDN, that's the server, just
15:39:20 14 returns the file that the viewer device requested.

15:39:23 15 No role at all. They didn't get up and cross-examine
15:39:28 16 this engineer on anything, let alone this opinion. The only
15:39:34 17 thing they established with Mr. Larumbe is he'd never met with
15:39:37 18 anybody from Voxer. That was the cross-examination. He never
15:39:41 19 met with anybody from Voxer. Right. That's our point too.

15:39:44 20 Now, why doesn't it play a role? It doesn't play a
15:39:47 21 role because the servers in Facebook Live aren't even capable
15:39:50 22 of measuring the bandwidth between themselves and the client
15:39:55 23 device. So it doesn't even have the information that you need
15:39:59 24 to make a selection.

15:40:00 25 We asked Mr. Larumbe: "where is the network

15:40:03 1 bandwidth determined?

15:40:04 2 "The viewer device performs an estimation of the
15:40:07 3 bandwidth available."

15:40:09 4 Does the CDN -- that's Facebook server; that's what
15:40:12 5 they're accusing. Does it know the network bandwidth between
15:40:17 6 itself? No, it doesn't. It's not even capable of making the
15:40:20 7 selection because it doesn't have the information.

15:40:22 8 Now, why did the Facebook engineers build a different
15:40:25 9 system? Why did they build a system where the client device
15:40:29 10 makes it? Mr. Larumbe told you that, too. The benefit of
15:40:36 11 doing it this way is the viewer device -- your phone, your
15:40:38 12 laptop, your tablet -- has more information, much more about
15:40:41 13 itself. It knows its screen resolution ability, the window
15:40:45 14 size, the network it's on. And that information is in the
15:40:49 15 viewer device, and the server doesn't have it.

15:40:53 16 So this idea that the server is participating or
15:40:57 17 having anything to do is not true. And even Dr. Mitzenmacher
15:41:01 18 admitted this. On cross-examination he admitted: "After
15:41:09 19 looking at the Facebook system and the Instagram system and all
15:41:12 20 the study you did, you said the user client must select a
15:41:16 21 version from the manifest." And "version" there refers to a
15:41:20 22 version of the degraded video, exactly what we're talking about
15:41:24 23 on this patent.

15:41:25 24 "Yes. That's right."

15:41:29 25 What is even their argument? Their argument is,

15:41:32 1 well, even though the client selects it, when it requests that
15:41:37 2 version, the server has to go find it. It has to fetch it.
15:41:42 3 Remember, you saw that yesterday during his rebuttal testimony.
15:41:45 4 He's saying the server makes a selection because it fetches
15:41:49 5 what the client selected. But he admits, "In normal
15:41:54 6 circumstances, the Facebook server will return the segment
15:41:58 7 selected by the client device, right?"

15:42:01 8 "Right."

15:42:03 9 It's the server that doesn't have discretion. The
15:42:05 10 server has to return what the client selected. When you go to
15:42:08 11 a restaurant and you order a meal, a wait person will bring you
15:42:14 12 the meal. But you're the one that's selected the meal. They
15:42:17 13 may have put it together and provided it, but you selected it.

15:42:20 14 I think the example Dr. Jeffay used was I go to a
15:42:24 15 truck dealership, and I pick out a Ford F-150 all-electric, I'm
15:42:29 16 making a selection. The dealer may have to find it, but the
15:42:32 17 selection is made by the buyer. And Dr. Mitzenmacher is trying
15:42:36 18 to pull a fast one on all of us when he says the servers
15:42:39 19 participate in this by pulling up the file. All they do is
15:42:43 20 fetch or retrieve. They fetch or retrieve the file that's
15:42:47 21 selected by the client device.

15:42:51 22 So, again, with respect to '557, Claim 1, it's not
15:42:59 23 satisfied. This is a server patent. The server has to perform
15:43:03 24 the step, and it hasn't performed the step.

15:43:07 25 Now, I want to go back to something that I passed

15:43:12 1 over, and I'm going to put it back up here. Let me see if I
15:43:14 2 can do this. Yeah. You may hear from Voxer, oh, it doesn't
15:43:17 3 matter where it's done. Bologna. These are server patents.
15:43:21 4 This claim is about a video service -- a video message service
15:43:26 5 infrastructure.

15:43:27 6 Dr. Jeffay was asked: "Claim 1 of the patent doesn't
15:43:31 7 say that the selecting step cannot be performed by a
15:43:35 8 recipient?"

15:43:36 9 He testified, "It doesn't say that, but a person of
15:43:39 10 skill would understand that the selecting step happens inside
15:43:43 11 the infrastructure," which is what this patent is all about
15:43:48 12 anyway.

15:43:48 13 So, based on the undisputed testimony of the Facebook
15:44:03 14 engineers, Claim 1 of the '557 patent is not infringed.

15:44:06 15 Let me make a very important point, and it's actually
15:44:09 16 at page 11 of your jury instructions. Both with respect to the
15:44:14 17 '270 and the '557, if you find that the independent claims are
15:44:20 18 not infringed, it's automatic that the dependent claims are not
15:44:23 19 infringed. You don't have to work any further.

15:44:26 20 In other words, the law is: If an independent claim
15:44:29 21 is infringed, any claim that's dependent on that -- excuse me.
15:44:32 22 If an independent claim is not infringed, any dependent claim
15:44:38 23 is also not infringed. You'll find that on page 11 of the jury
15:44:41 24 instructions.

15:44:41 25 And it's true for both the '270. If Claim 34, which

15:44:46 1 I discussed a few minutes ago, is not infringed. The other
15:44:49 2 claims aren't infringed either. The same thing is true here
15:44:54 3 with respect to '557.

15:44:56 4 I'll pause a minute just to point out that not even
15:45:04 5 Mr. Katis thought that Facebook Live infringed his patents.

15:45:07 6 Remember that back in 2016 after he saw what -- how
15:45:13 7 Facebook Live worked, he went on the ski trip? He sent an
15:45:18 8 e-mail to Facebook saying hey, here's my IP. Here's our --
15:45:22 9 some of our key patents. And the response he got from Facebook
15:45:24 10 was, hey, you may have great IP, but all of our properties are
15:45:30 11 doing something completely different, something completely
15:45:34 12 different, and we currently have no plans to extend into
15:45:38 13 different territories, point-blank. They were honest. We are
15:45:42 14 different from you. And Mr. Katis apparently agreed with that.

15:45:46 15 All good, Stan. Would love to grab lunch again
15:45:50 16 sometime.

15:45:50 17 So even Mr. Katis didn't believe there was
15:45:52 18 infringement.

15:45:59 19 Now, I'm going to spend a few moments here talking
15:46:01 20 about the '557 patent, invalidity. But if you find as I think
15:46:04 21 the evidence shows that the '557 patent is not infringed, then
15:46:12 22 the verdict form allows you to skip over this issue. You only
15:46:16 23 get to this issue if you find infringement of the '557 which,
15:46:20 24 as I said, I don't believe you can because the servers don't
15:46:24 25 perform this critical step.

15:46:26 1 But we're going to talk about this because it's on
15:46:29 2 the verdict form. But, again, you'll notice when you get to it
15:46:32 3 that you don't have to answer it if you've found
15:46:34 4 noninfringement of the claim.

15:46:38 5 So now let's talk about the Seckin patent
15:46:43 6 publication. Here it is. It's claim DTX249. It turns out
15:46:49 7 it's got a ribbon on it, too, just like the patents that Voxer
15:46:53 8 has. That's Ms. Seckin's patent application.

15:46:56 9 And, as you can see, it was filed and published in
15:47:00 10 December of 2004. Filed and published December of 2004. And,
15:47:05 11 like the patents, it has claims, it has descriptions, it has
15:47:10 12 figures. Some are handwritten. But you saw some of it in
15:47:15 13 Dr. Jeffay's testimony, some of it from Dr. Mitzenmacher. But
15:47:18 14 there it is.

15:47:19 15 Now, there's certain things about it that are
15:47:21 16 completely undisputed. It is prior art to the '557. No debate
15:47:25 17 about that. The parties agree. The patent application
15:47:30 18 publication qualifies as prior art even though it didn't become
15:47:33 19 a patent. Everyone agrees with that, including
15:47:36 20 Dr. Mitzenmacher, as you heard yesterday. No debate about
15:47:40 21 that.

15:47:41 22 The patent examiner did not consider the Seckin
15:47:43 23 publication in connection with Voxer's application. You might
15:47:50 24 ask how can that be. It's a patent application in the patent
15:47:53 25 office. Well, these patents have some super high numbers on

15:47:56 1 them, right? The patents we're talking about, the '270 and the
15:48:00 2 '557, they're in 10 million range. So there are millions of
15:48:07 3 patents, both issued patents and applications. And so it's not
15:48:10 4 unusual -- it is not unusual for patent examiners, if no one is
15:48:17 5 pointing out what's there, it's impossible for them to be aware
15:48:20 6 of everything.

15:48:21 7 But there's no dispute, because the '557 and every
15:48:25 8 patent lists on its cover page what has been considered.
15:48:29 9 There's usually a list of prior art references. And so when
15:48:33 10 you look at the '557, you will see on the cover page there is
15:48:37 11 no mention of and no reference to the Seckin patent
15:48:40 12 application.

15:48:42 13 And, finally, the fourth thing that we established
15:48:45 14 with Dr. Mitzenmacher yesterday, what Seckin disclosed is not
15:48:49 15 limited to the claims. What Seckin discloses is everything
15:48:55 16 inside, start to finish: all the text, all the figures, the
15:49:00 17 descriptions, all of that. It's not limited to the claims.
15:49:04 18 The publication has a lot more in it than the claims.

15:49:09 19 Now, this is very important, and it's one of the
15:49:14 20 instructions that Judge Yeakel read just a few minutes ago.
15:49:18 21 It's at page 17 of the jury instructions, page 17. And it says
15:49:24 22 that, where someone like Facebook is relying on prior art that
15:49:29 23 differs from the prior art considered by the patent office, you
15:49:33 24 should give that prior art more weight. Well, that applies to
15:49:36 25 Seckin.

15:49:37 1 In other words, if the patent office already
15:49:40 2 considered it, as jurors, you're entitled to give it little
15:49:43 3 weight. If the patent office didn't consider it and you're the
15:49:46 4 first ones to do so, then the reference is entitled to more
15:49:50 5 weight.

15:49:50 6 Here's the dates just to prove it up. Seckin
15:49:58 7 December 2004, no dispute. The earliest priority date for the
15:50:02 8 Voxer patents is June of 2007. So we're talking about
15:50:07 9 2 1/2 years.

15:50:08 10 Now, I think this is a pretty easy one, too, because
15:50:14 11 there's only one debate. Dr. Mitzenmacher, for all his trying,
15:50:19 12 only came up with one distinction. There's no debate that this
15:50:25 13 publication talks about video, it talks about live video, it
15:50:32 14 talks about live streaming video to client devices on the
15:50:37 15 right. These colors are kind of hard to see here, but we're
15:50:40 16 talking about that cloud has video in it. You'll see this is
15:50:45 17 figure 2 of the patent. You'll have it in the jury room, or
15:50:48 18 you'll get it on the electronic system.

15:50:51 19 And it's got live video content streamed through
15:50:54 20 servers and transcoders where bitrate versions are created.
15:50:59 21 And, just like in the '557, where there's a selection made by
15:51:05 22 the servers of which one to use. It discloses every single
15:51:09 23 element limitation of Claim 1 of the '557 patent. It's all
15:51:14 24 right there. And you can see it.

15:51:18 25 You may remember Dr. Jeffay showed us this, which was

15:51:24 1 how it works. If you read the descriptions, it's doing exactly
15:51:28 2 what '557 claims: live content, the transcoder creates
15:51:33 3 different versions there in the different colors, and the
15:51:36 4 server decides where to send it.

15:51:38 5 So let's take a look at the scorecard on this one.
15:51:42 6 He didn't contest any of these elements. The receiving,
15:51:46 7 generating, selecting, transmitting, all there. All there.
15:51:50 8 His one beef was, well, wait a minute. Seckin doesn't disclose
15:51:56 9 multidirectional, bidirectional. Remember he showed you this
15:52:00 10 figure, and he drew on the figure. This is from the '577.

15:52:05 11 Now, important point: This is not the claims of the
15:52:07 12 '557. You heard Dr. Mitzenmacher and the Voxer lawyers spend
15:52:12 13 the whole trial telling you you can't take an embodiment and
15:52:16 14 force it into the claim. You've got to stick with the claim
15:52:19 15 language.

15:52:20 16 The claim language of the '557 has nothing to do with
15:52:25 17 bidirectional. This is Dr. Mitzenmacher violating his own
15:52:29 18 ground rules, his own rule repeated over and over by the Voxer
15:52:32 19 lawyers. You can't take an embodiment. And he admitted on the
15:52:37 20 stand yesterday this is an embodiment. It is not the claim.

15:52:42 21 I encourage you as jurors to read the claim. There's
15:52:45 22 nothing in the claim about bidirectional. You receive, you
15:52:54 23 create degraded versions, you select a good version, and you
15:52:57 24 send it to the recipient.

15:52:58 25 There's no requirement in the claim. And when we're

15:53:00 1 looking at invalidity, it's just like infringement in this
15:53:03 2 respect. You're going to compare the claims to what's
15:53:08 3 disclosed in Seckin. If Seckin discloses every element, as I
15:53:12 4 just showed that it does, then it anticipates and renders this
15:53:19 5 patent invalid. And the only issue that you have to decide on
15:53:23 6 this one is: Does the claim of '557 require bidirectionality?
15:53:30 7 No.

15:53:30 8 Here's what Dr. Mitzenmacher showed you. This is the
15:53:33 9 definition from '557 of what a message from the -- from the
15:53:37 10 patent. It's an individual unit of communication from one user
15:53:43 11 to another. It is one-directional. This is the patent
15:53:47 12 defining what a message is, directly contradicting
15:53:50 13 Dr. Mitzenmacher. And he knew it.

15:53:52 14 "We're in agreement that what you highlighted for the
15:53:54 15 jury, that's a one-way communication, correct?"

15:53:56 16 "Yes. So if -- we can refer to that as a one-way if
15:54:02 17 you like."

15:54:02 18 The only other issue is Claim 9. And on Claim 9 the
15:54:09 19 only additional element requires using two protocols, and
15:54:13 20 Dr. Jeffay, with 30 years of experience, told you it would be
15:54:18 21 obvious to someone skilled in the art. That's not you or me or
15:54:23 22 anyone in the courtroom other than someone like Jeffay or
15:54:27 23 Mitzenmacher, who are experienced people. That's what a person
15:54:30 24 of skill in the art is. And Dr. Jeffay made very clear that
15:54:33 25 using one protocol to take the data in and another to send it

15:54:37 1 out was no big deal.

15:54:38 2 I'll close with this quote that you heard yesterday.

15:54:43 3 Maybe it was -- yes. It was yesterday. Ms. Panttaja, one of
15:54:48 4 the inventors on the Voxer patent, she was on video.

15:54:52 5 We asked her: "You were a coinventor?"

15:54:54 6 "It seems to say so."

15:54:55 7 "Could you take a look at Independent Claim 1?"

15:54:57 8 She looked at Claim 1.

15:54:59 9 "Sitting here today, can you tell us what the
15:55:03 10 advancement of this claim is over the prior art?" What's new?

15:55:06 11 "No, I can't."

15:55:09 12 No. They haven't explained it either. They haven't
15:55:12 13 explained -- other than this bidirectional argument that
15:55:16 14 Dr. Mitzenmacher is trying to run, they haven't explained what
15:55:19 15 the '557 does over and above any prior art.

15:55:23 16 So I'll say thank you. I appreciate your time and
15:55:25 17 attention. I'm going to turn the floor over to Ms. Anderson,
15:55:29 18 who is going to talk about -- there's our checkmarks on
15:55:34 19 invalidity. That's a "yes" not a "no."

15:55:36 20 She's going to talk about this. Voxer's technology
15:55:40 21 was not right for Facebook or anyone else. Thank you.

15:55:45 22 MS. ANDERSON: Good afternoon, ladies and gentlemen.

15:56:12 23 My name Christa Anderson. And on behalf of Facebook
15:56:16 24 and Instagram, I'd like to thank you again for the time and
15:56:19 25 attention you've given to this matter over these many days.

15:56:22 1 As Mr. Van Nest mentioned, I will be addressing the
15:56:27 2 subject of damages in the last 15 or so minutes of this
15:56:30 3 presentation for the defendants. But before I dive in, I'd
15:56:34 4 just like to make an important note. That although I am going
15:56:38 5 to be discusses damages, it is not because Facebook and
15:56:42 6 Instagram concede that there is any infringement of any patents
15:56:46 7 in this case.

15:56:48 8 So why am I going to be discussing it with you? It's
15:56:51 9 because this is the last chance we will ever get to talk to you
15:56:55 10 about the facts in this case, and we want to provide you an
15:56:58 11 overview of some important evidence we think would be helpful
15:57:02 12 to you, were you to find infringement. We want to make sure we
15:57:07 13 give you some overview before you go into your discussions.

15:57:11 14 And, according to the evidence that has been
15:57:13 15 presented during the course of this trial, we submit that the
15:57:19 16 strong weight of the evidence clearly supports a finding of
15:57:23 17 noninfringement or invalidity on the patents in this case.

15:57:26 18 We also believe that the evidence clearly supports a
15:57:31 19 finding that any reasonable royalty, any damages in the case,
15:57:35 20 is nowhere near the \$174 million running royalty being demanded
15:57:42 21 by Voxer in this matter.

15:57:45 22 Instead, the evidence presented during the course of
15:57:49 23 this trial supports a finding that any reasonable royalty in
15:57:53 24 this matter would be a lump-sum royalty in an amount towards
15:57:58 25 the lower end of the range developed by Voxer's own hired

15:58:03 1 valuation expert before this case was ever filed, which found a
15:58:08 2 range of between 5- and 22.9-million for the entire Voxer
15:58:14 3 patent portfolio.

15:58:16 4 So let's begin our discussion with touching briefly
15:58:24 5 on some important principles you heard during the jury
15:58:30 6 instructions about the subject of damages.

15:58:32 7 In a patent case, damages are not meant to punish.
15:58:40 8 Instead, damages are measured as a reasonable royalty for the
15:58:43 9 patented inventions. That reasonable royalty can be no more
15:58:48 10 and no less than the value of just the patented inventions at
15:58:53 11 issue. As you've heard and as indicated on the screen, a
15:58:59 12 reasonable royalty is what the parties would have agreed to at
15:59:03 13 a hypothetical negotiation in November of 2018.

15:59:11 14 And, as both experts agree, both Voxer's expert and
15:59:14 15 as Facebook's experts agreed on the stand, that negotiation is
15:59:18 16 presumed to be a "cards up." The parties each know the
15:59:22 17 relevant information going into that hypothetical negotiation.

15:59:29 18 Now, during this trial you have heard evidence, most
15:59:34 19 of it undisputed, about what the parties would have known when
15:59:41 20 they entered into that hypothetical negotiation in 2018 for a
15:59:47 21 license to the two patents that are at issue in this case.

15:59:49 22 A review of that evidence demonstrates that the
15:59:51 23 hypothetical negotiation between these two parties would have
15:59:55 24 resulted in a lump sum royalty payment in an amount much, much
16:00:01 25 less than was demanded by Voxer in this case.

16:00:07 1 So what is that evidence? What would both parties
16:00:09 2 have known when they sat down to this hypothetical negotiation?

16:00:14 3 Well, as an initial matter, both parties sitting down
16:00:21 4 in 2018 in a hypothetical negotiation would have known that no
16:00:24 5 company has ever taken a patent license to any of the patents
16:00:27 6 in this case. In other words, Voxer had no successful history
16:00:33 7 of licensing its patents.

16:00:35 8 Here we have on the screen the testimony of
16:00:38 9 Mr. Ratliff confirming what he wrote in his report, that he was
16:00:40 10 aware of no Voxer licenses to the patents-in-suit or any
16:00:45 11 evidence of the patents-in-suit having been licensed.

16:00:48 12 I'd also note that Mr. Ratliff acknowledged during
16:00:53 13 his testimony that some licenses that Mr. Katis referenced
16:00:57 14 early in the case when he was testifying were not patent
16:01:04 15 licenses. Instead, they were user licenses, the kind you might
16:01:06 16 click on to subscribe to a service. Those are not at issue in
16:01:10 17 this case.

16:01:11 18 Now, during the hypothetical negotiation, sitting
16:01:16 19 down in 2018, both parties would have known about the 2017
16:01:23 20 Houlihan Lokey valuation. As you may recall from the evidence,
16:01:27 21 Voxer hired a well-respected valuation expert known as
16:01:32 22 Black Stone first, and they changed their name to Houlihan
16:01:34 23 Lokey, to examine the value of Voxer's patent portfolio. And,
16:01:40 24 in particular, Houlihan Lokey examined what the patents would
16:01:44 25 be valued for Facebook, given the value of Facebook Live to

16:01:48 1 their business.

16:01:51 2 And we see here on the screen an e-mail discussed by
16:01:54 3 Ms. Lawton during her testimony, an e-mail from Voxer's own
16:01:59 4 CEO, Irv Remedios, instructing Houlihan Lokey to take a look at
16:02:05 5 just that, just the issue of the valuation for Facebook, given
16:02:08 6 the value of Facebook Live to that business.

16:02:10 7 And Houlihan Lokey did that valuation work at Voxer's
16:02:17 8 request. As you have heard from Ms. Lawton, Houlihan Lokey
16:02:22 9 applied a generally accepted valuation method and determined
16:02:26 10 the value of that whole patent portfolio to Facebook's --
16:02:32 11 Facebook Live product was valued at between 5 million and
16:02:36 12 22 million. You see it highlighted on the screen.

16:02:40 13 It's important to note here that this valuation was
16:02:44 14 for a patent portfolio license on 209 patents and patent
16:02:50 15 applications, which included the patent family at issue here,
16:02:54 16 regarding the '270 and '557 patents that were issued beginning
16:02:58 17 the following year. And included applications using the same
16:03:03 18 specification as those patents and included the actual
16:03:06 19 application for the '270 patent. In other words this 5
16:03:12 20 million-to-22.9 million valuation is for far, far more patent
16:03:17 21 rights than what would be at issue in the hypothetical
16:03:21 22 negotiation for just two patents in this case.

16:03:27 23 And while Voxer's lawyers have argued that somehow
16:03:29 24 these numbers should have been bigger and they crossed them out
16:03:33 25 and wrote a bigger number on top, we know from Ms. Lawton's

16:03:37 1 testimony that that reflected a misunderstanding on Voxer's
16:03:41 2 counsel's part of how to apply principles, including principles
16:03:44 3 of net present value. We have here in front of us on the
16:03:48 4 screen the Houlihan Lokey valuation that they made at Voxer's
16:03:53 5 request just a year before the hypothetical negotiation.

16:03:59 6 What else do we know about this negotiation? Well,
16:04:01 7 we know that both parties entering this cards-up negotiation
16:04:07 8 would realize that lump-sum royalties, not a running royalty
16:04:13 9 were going to be the rule of day at this negotiation. In
16:04:16 10 particular, you heard undisputed evidence in this case. Both
16:04:20 11 Mr. Ratliff and Ms. Lawton looked at all the Facebook patent
16:04:24 12 licenses in the case, about 150. Not a single one was a
16:04:29 13 running royalty license. It was standard practice, as you
16:04:33 14 heard from Ms. Lawton, in the relevant industry to enter
16:04:37 15 lump-sum royalties. And even Voxer's own patent valuation
16:04:42 16 expert, Houlihan Lokey, in the screen we just reviewed, that
16:04:45 17 was a lump-sum royalty valuation.

16:04:49 18 So what does this all mean? This means that sitting
16:04:55 19 down at this negotiation, this hypothetical negotiation, the
16:04:59 20 parties would have been focused in the range of the Houlihan
16:05:03 21 Lokey valuation. You see here on the screen I've indicated on
16:05:08 22 the screen in green bars \$5 million and \$22.9 million as the
16:05:13 23 range of the Houlihan Lokey valuation.

16:05:16 24 And indicated above, that's for 209 patents and
16:05:19 25 patent applications. And that was performed before there was a

16:05:24 1 lawsuit and lawyers involved. This is prelitigation, just a
16:05:28 2 year before the state of the hypothetical negotiation.

16:05:30 3 In contrast, you see Mr. Ratliff's number indicated
16:05:35 4 in the red bar on the right is far off from the reality of what
16:05:42 5 would have happened in such a negotiation. His enormous
16:05:46 6 figure, 107.4 million, for only two patents developed after the
16:05:50 7 filing of litigation.

16:05:51 8 Why are those numbers so far off from reality? Well,
16:05:57 9 among other things, because we learned through the evidence
16:06:02 10 that, in fact, Mr. Ratliff made a number of errors in his
16:06:06 11 calculation. Let's talk about this.

16:06:08 12 You may recall this slide from viewing Ms. Lawton's
16:06:12 13 testimony. She went over those with you, and she described
16:06:16 14 some of those errors. Number one, usage-based royalty. This
16:06:20 15 is the issue of a running royalty. It's another way of saying
16:06:24 16 a usage-based royalty. And she explained to you, as we've just
16:06:28 17 gone over in the evidence, there's no evidence in the record to
16:06:30 18 support applying a running royalty to this case.

16:06:33 19 Second, Ms. Lawton explained to you that Mr. Ratliff
16:06:37 20 failed to do an economic analysis of the incremental value of
16:06:43 21 the patents. He chose to rely on the subjective technical
16:06:49 22 analysis Dr. Mitzenmacher, and Dr. Mitzenmacher did not drill
16:06:53 23 down on what did the patented inventions actually contribute to
16:06:58 24 the value of the server. Instead, he just assumed the entire
16:07:02 25 value of the server was attributable to the patented inventions

16:07:06 1 in this case. That is not supported by evidence in this
16:07:09 2 matter, and you heard the critiques, for example, from
16:07:12 3 Dr. Jeffay about the problems with Dr. Mitzenmacher's valuation
16:07:17 4 technical apportionment.

16:07:18 5 Third, Mr. Ratliff had errors in his calculation
16:07:25 6 regarding the third item, Facebook Live profitability.

16:07:27 7 You remember, perhaps, from Mr. Poffenberger's
16:07:30 8 testimony yesterday, and he went over a lot of this with us.
16:07:37 9 He showed that Mr. Ratliff had actually ignored the significant
16:07:40 10 difference between the lower revenues for watch time on
16:07:43 11 Facebook Live videos as opposed to other Facebook revenues that
16:07:47 12 artificially inflated Mr. Ratliff's numbers.

16:07:51 13 Mr. Ratliff also admitted he ignored a report in
16:07:55 14 evidence that demonstrated that Facebook Live had an
16:08:00 15 insignificant effect on revenues. He simply ignored it as part
16:08:06 16 of his analysis.

16:08:07 17 And we also learned that Mr. Ratliff misunderstood
16:08:09 18 the meaning of numbers, including a 44 percent number which
16:08:13 19 I'll get to in a moment -- ignored numbers that even
16:08:15 20 Mr. Ratliff admitted had been important to his analysis.

16:08:19 21 And, finally, number four on our screen, profit to
16:08:23 22 Voxer. Mr. Ratliff assumed as part of his hypothetical
16:08:28 23 negotiation analysis that the parties would sit down and agree
16:08:35 24 that, at this negotiation, Voxer would be entitled to the
16:08:40 25 entire profit margin resulting from that analysis, as if

16:08:44 1 Facebook would sit down to such a one-sided deal at this
16:08:47 2 hypothetical negotiation. There's no evidence in the record to
16:08:50 3 support this notion.

16:08:51 4 And I'd like to take a quick moment just to take a
16:08:57 5 closer look at one of those errors made by Mr. Ratliff. You
16:09:00 6 may recall this slide with the green bars indicating 44 percent
16:09:05 7 on the right. And you may recall that Mr. Ratliff said the
16:09:08 8 only number in all of this that ultimately matters was
16:09:12 9 44 percent in 2018. And he said that was -- that 44 percent of
16:09:18 10 Facebook's total ad revenues in 2018 came from video. That's
16:09:23 11 what Mr. Ratliff said.

16:09:25 12 Here's his testimony on that matter, again,
16:09:28 13 confirming what he had testified to in this trial about the
16:09:31 14 44 percent number.

16:09:33 15 However, you recall Mr. Poffenberger's testimony
16:09:39 16 yesterday, and explained Mr. Ratliff was mistaken. Facebook
16:09:44 17 provided Voxer and Mr. Ratliff with the actual data on video
16:09:49 18 revenues, but Mr. Ratliff did not use it. Instead, Mr. Ratliff
16:09:52 19 used numbers that concerned video format ads, which are
16:09:58 20 basically commercials running in a news feed, that have nothing
16:10:02 21 to do with Facebook Live or prerecorded video content.

16:10:05 22 This wasn't a small error. Mr. Poffenberger
16:10:08 23 explained, instead of that 44 percent figure in 2018, the
16:10:13 24 actual number for video revenues was 5.5 percent. What this
16:10:22 25 means, ultimately, is that Mr. Ratliff used a number that was

16:10:25 1 almost 10 times the real number. He used 44 instead of 5.5.

16:10:31 2 And we see Mr. Poffenberger's testimony on the
16:10:34 3 screen.

16:10:34 4 So bearing these facts all in mind and the evidence
16:10:38 5 shows that a hypothetical negotiation between these parties in
16:10:42 6 November of 2018, cards up over two patents in this case, would
16:10:49 7 result in a lump-sum royalty in an amount that is at the low
16:10:52 8 end, at the range of the 5 million to 22.9 million dollars
16:10:56 9 circled in blue on this screen before you.

16:11:00 10 It's the valuation reached by Voxer's own valuation
16:11:05 11 experts before the case was filed, just a year before the
16:11:07 12 hypothetical negotiation date. It's tethered to the reality of
16:11:11 13 the parties. It's tethered to what happened before there was
16:11:15 14 any litigation. And it encompasses -- those numbers encompass
16:11:21 15 209 patents and patent applications.

16:11:24 16 In contrast, Mr. Ratliff's \$174 million running
16:11:29 17 royalty, which would amount over time to more than \$400 million
16:11:35 18 as a running royalty is premised on a series of errors. It is
16:11:39 19 inconsistent with the evidence in this case.

16:11:42 20 In this battle, ultimately of Voxer's own experts,
16:11:45 21 the accurate assessment, the one that is far more reliable than
16:11:50 22 Mr. Ratliff's is the one submitted by Houlihan Lokey indicated
16:11:55 23 in the range in the green on the screen before you.

16:11:57 24 Ladies and gentlemen, that brings us to the
16:12:02 25 conclusion of Facebook and Instagram's closing argument in this

16:12:07 1 matter. As we will not have another opportunity to address
16:12:15 2 you, we submit that the evidence in this case does support and
16:12:18 3 proves that Facebook did not infringe any patents in this case;
16:12:24 4 that one patent at issue is invalid.

16:12:27 5 But, that said, regardless of your verdict, we thank
16:12:30 6 you for the time and attention you have given to this matter
16:12:35 7 over time. It is important to the parties. Thank you.

16:12:40 8 THE COURT: Plaintiffs may close.

16:12:43 9 **PLAINTIFF'S REBUTTAL ARGUMENT**

16:12:43 10 MR. POWELL: Thank you, Your Honor.

16:12:44 11 Could we pull up DTX392 at page 47, please. And
16:12:52 12 could you highlight the bottom where it says "Total
16:12:55 13 consideration for patent value," all the way over.

16:12:58 14 And the ladies and gentlemen of the jury will recall
16:13:01 15 this exhibit that the defendants just showed you. And remember
16:13:06 16 it's in millions. It's up in the upper left hand.

16:13:09 17 So the actual total value of Voxer's patent in this
16:13:12 18 document is 127 million. They had other scenarios which were
16:13:18 19 presented just a short while ago by me which actually have this
16:13:22 20 number closer to 160 million in one scenario and over
16:13:25 21 200 million in another scenario. So don't be fooled that,
16:13:29 22 somehow, 5 to 22 is the right number. The right number is
16:13:33 23 actually elsewhere in the document.

16:13:36 24 The other thing about Houlihan Lokey I want to make
16:13:38 25 sure is clear, although I did mention it a short minute ago,

16:13:42 1 Houlihan Lokey did not perform a hypothetical negotiation
16:13:45 2 analysis for this case.

16:13:47 3 As the defense lawyers just acknowledged, that came
16:13:50 4 over a year before the hypothetical negotiation, which means it
16:13:54 5 doesn't satisfy the court's requirement in the jury
16:13:56 6 instructions that you were just read. It doesn't analyze the
16:14:01 7 Georgia-Pacific factors. It doesn't analyze the
16:14:04 8 patents-in-suit. It doesn't go through all of the categories
16:14:08 9 and groups of considerations that Mr. Ratliff did. So that
16:14:11 10 opinion, if you want to call it that, really is not capable of
16:14:15 11 being considered by the jury for this case.

16:14:18 12 And that leaves you on the damages side only with
16:14:22 13 Mr. Ratliff's fully supported analysis under the
16:14:25 14 Georgia-Pacific factors and his conclusion as to what the
16:14:28 15 reasonable royalty would be.

16:14:29 16 Now, another thing to clear up real quickly is the
16:14:34 17 identifier. And the ladies and gentlemen of the jury will
16:14:35 18 recall, in my cross-examination of defense experts, we talked
16:14:43 19 about the identifier of hunting and fishing.

16:14:46 20 Facebook would have you believe that the identifier
16:14:49 21 required in the patent claims is something like a social
16:14:51 22 security number, something that identifies a unique individual
16:14:54 23 and guarantees that you can get something to them. Nothing
16:14:57 24 could be further from the truth. The patent claims are quite
16:15:00 25 broad, and identifiers can be anything that associates that

16:15:04 1 video communication with a potential recipient.

16:15:07 2 So your identifier might be cooking. My identifier
16:15:11 3 might be hunting and fishing. So if there's a cooking video
16:15:15 4 that gets broadcast through the Live platform, it may find you.
16:15:19 5 If there's a hunting video broadcast through the Live platform,
16:15:22 6 it may find me.

16:15:23 7 And one thing to remember that's important here: The
16:15:26 8 patents deal with time-shifting. So they want to say the
16:15:29 9 delivery has to happen -- that's not quite right. It has to
16:15:33 10 happen eventually under certain of the claims. But under other
16:15:38 11 claims, it never has to happen, or it can happen a day, a week,
16:15:42 12 a month, years later.

16:15:43 13 And, for infringement, we would find that as soon as
16:15:47 14 it happens, we can call that an infringing use. But to say it
16:15:51 15 has to identify someone to the level of a social security
16:15:53 16 number is just frankly wrong.

16:16:01 17 Now, another thing that you heard the defendants just
16:16:03 18 say is that their system is pull and ours is push. Well,
16:16:06 19 that's also irrelevant. Why? Because of the extra step
16:16:09 20 instruction that you just heard from the judge. An extra step
16:16:14 21 in an accused process cannot be a basis for finding no
16:16:19 22 infringement. So whether it's a pull or push system isn't the
16:16:23 23 question. The question is whether the claim elements are
16:16:25 24 satisfied.

16:16:26 25 And just because they want to interject an extra step

16:16:29 1 where, after the recipient is notified, the client has to make
16:16:31 2 a request, that's not a noninfringement position. That's just
16:16:35 3 a design option that they put into their system that's not
16:16:38 4 required by the patent.

16:16:43 5 We also heard about the Seckin patent publication.
16:16:46 6 And please remember, Seckin is not a patent. That means it's
16:16:50 7 not even an invention. And "invention" is a special word.
16:16:54 8 Invention is a special word given to innovations that make it
16:16:58 9 through the patent office and issue in a patent. Then you can
16:17:01 10 call it an invention. That's not what Seckin is.

16:17:05 11 And you heard Dr. Mitzenmacher talk about why that
16:17:07 12 lessens its value as prior art. So the value is lessened. The
16:17:13 13 burden is really high, clear and convincing. And if you
16:17:18 14 believe any of Dr. Mitzenmacher's testimony on Seckin, then
16:17:20 15 that's going to leave you with lingering doubts. And that
16:17:24 16 means you don't achieve the level of overcoming the
16:17:27 17 presumption.

16:17:28 18 And there's something really interesting about Seckin
16:17:30 19 not being a patent. If it were a patent, how would the Voxer
16:17:34 20 patents have issued over it? If it's the same thing, how would
16:17:38 21 Voxer have gotten a patent in the first place? If Seckin was
16:17:42 22 an invention from 2004, how did patent applications with a
16:17:46 23 priority date of 2007 ever issue? It just doesn't make sense.
16:17:50 24 It doesn't add up.

16:17:52 25 The reason the Voxer patents issued, Seckin is

16:17:54 1 something completely different. We looked at it on my
16:17:56 2 cross-examination of Dr. Jeffay. It's an algorithm. Seckin
16:18:02 3 didn't invent an infrastructure. Seckin tried to get a patent
16:18:06 4 on something called a DBA algorithm. That's not what we're
16:18:10 5 here to discuss, and that's why it has no relevance to the
16:18:12 6 asserted patents.

16:18:14 7 Now a couple of other things. If we could pull up
16:18:17 8 PDX5.7. This is a slide I used in cross-examination. This is
16:18:28 9 Facebook's system. And if we can blow up the live streaming
16:18:29 10 infrastructure.

16:18:30 11 And recall, I asked the experts about infrastructure,
16:18:33 12 architecture, can they be used interchangeably? And
16:18:36 13 essentially, that's how it's been treated in this trial. And
16:18:40 14 what we can see here -- and, unfortunately, it's not really
16:18:46 15 good quality, so hopefully on the monitor in front of you you
16:18:49 16 can see.

16:18:49 17 The left side, red, is a broadcast client. That's a
16:18:52 18 client device. Everything between there and the blue playback
16:18:57 19 client is server architecture. So between those two bookends
16:19:00 20 is server. But all of it is the infrastructure.

16:19:03 21 So when we look at '557 patent's message -- it's
16:19:06 22 called video message service infrastructure, it includes
16:19:10 23 end-to-end, every component, the application on the devices,
16:19:14 24 the servers in the middle, the application on the other device.
16:19:18 25 Facebook controls it all from start to finish. That means

16:19:23 1 that, in Claim 1 of the '557 patent, the video message
16:19:28 2 infrastructure includes servers and it includes clients.

16:19:32 3 Now, the defense wants to suggest, well, how can it
16:19:34 4 send something to itself? Again, they're trying to use common
16:19:39 5 concepts such as can a computer make a choice, can a server
16:19:46 6 send something to itself. Of course it can. Look at how many
16:19:50 7 servers are in this infrastructure. Clients can be in the
16:19:54 8 millions. So a client can send something to the server, the
16:19:58 9 server can send something to the client, the client can send
16:20:01 10 something to another client. It's all within the
16:20:03 11 infrastructure.

16:20:04 12 So don't be fooled that, for some reason, this patent
16:20:07 13 claim requires there to be two separate entities, one under the
16:20:11 14 control of somebody else. It's just not accurate because the
16:20:15 15 patents are given broad construction, we're not importing
16:20:19 16 limitations from the specification, which is what the defense
16:20:21 17 would like to do.

16:20:25 18 All right. Now, a couple of other things that
16:20:29 19 started early on in the defense's argument. I want to make
16:20:33 20 this clear. It does not matter if Facebook did not copy
16:20:38 21 Voxer's technology. It does not matter if they never heard
16:20:43 22 about Voxer. It does not matter if they knew about Voxer's
16:20:47 23 patents or not. Because this is a strict liability claim.

16:20:51 24 And, once they implemented the system -- and even
16:20:54 25 though the patents came later, once they implemented the system

16:21:00 1 and it's infringing, whether they knew about it or not does not
16:21:03 2 matter. This is not required, that they had to have prior
16:21:06 3 notice of the patents to find infringement.

16:21:14 4 Let's see. Oh, another important point that you
16:21:15 5 didn't hear the defense talk about: Where are Facebook's
16:21:17 6 patents for the live streaming infrastructure? You haven't
16:21:21 7 seen any. They haven't presented a single patent on their live
16:21:26 8 streaming infrastructure.

16:21:29 9 Why? Voxer has the patents. They have two -- over
16:21:32 10 200 of them. Facebook can't get patents on their live
16:21:36 11 streaming infrastructure. Voxer already patented that
16:21:38 12 invention. So that's an important distinction that you
16:21:42 13 obviously don't hear the defendants focusing on.

16:21:47 14 Okay. Let's talk about some other things, and let me
16:21:51 15 kind of raise the discussion up a little bit as we approach the
16:21:54 16 conclusion of this trial.

16:21:57 17 And now, ladies and gentlemen, we have covered quite
16:22:02 18 a bit of ground in the past several days. We're now closing in
16:22:06 19 on the finish line. Of course, nobody gets to the finish line
16:22:09 20 without your help in deliberation.

16:22:12 21 That's an interesting word "deliberation," not one we
16:22:16 22 typically use in everyday parlance. But for purposes of today,
16:22:20 23 and as the judge has instructed, it means to give all of the
16:22:24 24 evidence a, quote, impartial consideration with your fellow
16:22:27 25 jurors. That's the task ahead of you. And Voxer believes, if

16:22:32 1 you do that, you will see this through to the finish line and
16:22:35 2 award it the \$175 million reasonable royalty it has proven that
16:22:41 3 it is entitled to.

16:22:43 4 And here's something I want you to think about as you
16:22:46 5 go through that process: For whose benefit did Voxer bring
16:22:51 6 this lawsuit? Voxer brought this lawsuit for Matthew Ranney,
16:22:57 7 Mr. Katis, and all the former and current Voxer employees that
16:23:02 8 knew they brought live messaging to the world and that they did
16:23:07 9 it before anyone else.

16:23:08 10 And you know who else believed Voxer's technology was
16:23:11 11 a step above everything else? Our friends at Houlihan Lokey,
16:23:15 12 the firm that Facebook's own damages expert, Mr. Cathy Lawton
16:23:18 13 talked to you about yesterday.

16:23:20 14 If we could go to my first slide.

16:23:22 15 This is in the Houlihan Lokey report. It's defense
16:23:25 16 Exhibit 392. As we see here, Houlihan Lokey places Voxer's
16:23:30 17 live messaging technology at the top of this heap of the best
16:23:34 18 of the best of social media communications and traditional
16:23:39 19 media companies. Houlihan Lokey identifies Voxer as resting
16:23:43 20 atop even Facebook Live. They're right there in the middle.
16:23:46 21 So Voxer is on top of Facebook Live, which we have -- which as
16:23:52 22 we've seen this week, launched an infringing live video
16:23:56 23 messaging infrastructure in 2015.

16:23:59 24 Remember The Rock video that Facebook played during
16:24:03 25 trial? That's 2015. Voxer's top-of-class hybrid messaging

16:24:07 1 system that combines asynchronous and synchronous conversations
16:24:12 2 is the top of its field, according to Houlihan Lokey.

16:24:16 3 Now, one thing I need to make sure we all understand.
16:24:22 4 Facebook makes money from its Facebook and its Instagram Live
16:24:27 5 video messaging services. As we learned during
16:24:30 6 cross-examination of Ms. Lawton, Facebook, quote, Instead of
16:24:33 7 paying to use Facebook and other products and services we
16:24:37 8 offer, by using the Facebook products covered by these terms,
16:24:40 9 you agree that we can show you ads that businesses and
16:24:44 10 organizations pay us to promote on and off the Facebook company
16:24:47 11 products, end quote.

16:24:49 12 Now, we also learned that Facebook, "uses your
16:24:53 13 personal data, such as information about your activity and
16:24:56 14 interests, to show you ads that are more relevant to you," an
16:25:00 15 identifier: cooking, hunting, fishing. That's how they show
16:25:05 16 you ads. It's all how they show you live videos that you're
16:25:09 17 going to be interested in. And Facebook decides who gets to
16:25:12 18 see it. You heard testimony on that during this trial.

16:25:16 19 Now, Facebook's corporate representative tried to say
16:25:20 20 Facebook doesn't make money on its news feed from live content
16:25:24 21 or video content. On cross-examination, however,
16:25:27 22 Mr. Poffenberger acknowledged what Mr. Ratliff had told you
16:25:30 23 days before about Facebook's video-first strategy.
16:25:34 24 Mark Zuckerberg had bragged about it to the press. Video being
16:25:38 25 50 percent of all time spent on Facebook and Instagram

16:25:42 1 services. Hard to imagine Mr. Zuckerberg being happy if it
16:25:46 2 didn't make them money.

16:25:48 3 And you will recall Mr. Ratliff informing you, and
16:25:52 4 we've seen versions of this slide. He informed you just -- in
16:25:57 5 just a few months, live video will be 25 percent of all
16:26:01 6 Facebook video watch time over all surfaces. So it's an
16:26:09 7 incredibly fast-growing business and important piece of
16:26:12 8 Facebook's business model.

16:26:13 9 Now, you will recall Mr. Ratliff testifying about the
16:26:15 10 competitive landscape that Facebook faces with companies like
16:26:19 11 TikTok, Twitch, Youtube, Amazon, the same companies you saw on
16:26:23 12 the Houlihan Lokey slide just a moment ago. If Facebook
16:26:27 13 falters on its video-first and live video offerings, it will
16:26:31 14 not remain competitive in the social networking space and it
16:26:34 15 will lose subscribers to other social media companies. This
16:26:38 16 will cost Facebook in terms of lost ad revenue. So Live is
16:26:42 17 critical to Facebook's -- Facebook's future.

16:26:48 18 Now, when Facebook's expert Dr. Bhattacharjee
16:26:50 19 admitted the asserted claims of the '270 patent did not require
16:26:53 20 guaranteed delivery, he cut Facebook's entire noninfringement
16:26:58 21 theory from the case. Think about it, ladies and gentlemen.
16:27:01 22 Because Facebook designed its system so it could censor these
16:27:06 23 video communications, they want you to find they don't
16:27:09 24 infringe.

16:27:10 25 As you heard from each and every technical witness,

16:27:12 1 and as the Court's jury instructions tell you, intervening
16:27:16 2 unclaimed steps in the accused process do not preclude a
16:27:19 3 finding of infringement. They're trying to run a gimmick here.
16:27:24 4 The extra steps do not matter. As long as the enumerated steps
16:27:28 5 are performed, Facebook could add hundreds or thousands of
16:27:32 6 additional steps, and nothing changes. It's still infringes.

16:27:41 7 As you heard, Voxer's beginnings were on a
16:27:44 8 battlefield in Afghanistan. Following the 2011 terrorist
16:27:49 9 attacks on the World Trade Center in New York City, Tom Katis
16:27:53 10 took that cowardly attack as a call to arms, and he reenlisted
16:27:58 11 in the Armed Forces to defend and protect his country, to
16:28:02 12 protect yours and mine, all of ours, our right to free speech.

16:28:05 13 So, yes, the Voxer patented method does not include
16:28:08 14 the step of big brother type censorship because Voxer never
16:28:12 15 considered using its live messaging platform to inhibit free
16:28:17 16 speech. Rather, Voxer sought to promote free speech through
16:28:22 17 its game-changing live messaging inventions.

16:28:24 18 Now, you have probably heard "presumed innocent until
16:28:26 19 proven guilty." This is a precept of American jurisprudence.
16:28:30 20 It's what ensures that innocent men and women do not get
16:28:35 21 wrongly incarcerated. Well, in this case there's a very
16:28:36 22 important presumption as well. You've heard about it here
16:28:38 23 today, the presumption of invalidity.

16:28:40 24 A lot of work by the inventors and especially by the
16:28:43 25 United States Government Patent Office went into making sure

16:28:46 1 these two issued patents were new and inventive and deserving
16:28:50 2 of protection under the law. That is why they are presumed
16:28:53 3 valid and why Facebook's challenges to them must be rejected,
16:28:57 4 because if you credit any of Dr. Mitzenmacher's testimony, you
16:29:04 5 must have lingering doubts.

16:29:07 6 And Facebook now admits they have no defense
16:29:10 7 regarding the validity of the '270 patent. None. They had
16:29:12 8 years, years to scorch the earth looking for prior art. Not
16:29:17 9 one. And Seckin anticipates the '557, why don't they assert it
16:29:21 10 against the '270? They know it doesn't reach all the elements
16:29:25 11 of either patent.

16:29:28 12 They found not a single prior art reference even
16:29:31 13 worthy of showing you all, not one. So the '270 patent is now
16:29:35 14 admitted to be valid, and the presumption of validity is now
16:29:38 15 more than just a presumption, it's a fact. It's a fact.

16:29:43 16 Remember Matt Ranney. Mr. Ranney didn't have to come
16:29:46 17 here and testify. He left Voxer years ago. He now lives in
16:29:50 18 Pennsylvania. But he, unlike Mark Zuckerberg, Mike Schroepfer,
16:29:53 19 and Peter Deng, he made the trip out here to talk to you. He
16:29:57 20 left his family back in Pittsburgh to come share his story.

16:30:04 21 Sadly, his story so far is not a terribly happy one.
16:30:08 22 You heard him testify he left Voxer because it had no future in
16:30:12 23 light of Facebook's taking the market opportunity for live
16:30:15 24 video messaging from Voxer without compensating Voxer for the
16:30:18 25 use of its patented technology.

16:30:20 1 When Mr. Ranney and Mr. Katis started Voxer, they
16:30:24 2 could see the future of video messaging. They even laid out
16:30:28 3 the conversation management system in their first provisional
16:30:31 4 patent application that foretold the future of social media.

16:30:36 5 The Facebook and Instagram Feed, which I suspect many
16:30:39 6 of you scroll through quite often, that is a conversation
16:30:44 7 management system just like what Mr. Ranney and Mr. Katis
16:30:47 8 sketched out back in early 2007 and put in their first
16:30:51 9 provisional patent application that was filed on June 28, 2007.

16:30:59 10 Then they met the Panttajas, the engineers who helped
16:31:02 11 them figure out the architecture for that conversation
16:31:05 12 management and live messaging system. Their collective work is
16:31:09 13 reflected in the second provisional patent application that
16:31:13 14 Voxer filed on October 19, 2007. You know that date,
16:31:17 15 October 19, 2007. That's the priority date for both patents.
16:31:23 16 And that is the date that tells you, the jury, whether proper
16:31:28 17 prior art is relevant to the validity of the patent or not.

16:31:31 18 And there's only one piece of prior art. We've
16:31:32 19 talked about the Seckin publication. It's not a patent. It's
16:31:36 20 an application. Yes, an application. Ms. Seckin did not get a
16:31:40 21 patent. Her application failed, something you heard Dr. Jeffay
16:31:45 22 testify he wasn't even aware of. He asserted it as a basis of
16:31:50 23 his opinion and didn't even bother to check if it was an issued
16:31:53 24 patent, which is quite strange because patent filings are
16:31:57 25 public record and are easily looked up.

16:31:59 1 Now, you also heard testimony from Dr. Jeffay that
16:32:02 2 patents have a 20-year term and that term is measured from the
16:32:06 3 first original patent application. This one Voxer filed on
16:32:09 4 February 8th, 2008. So that means the '557 and the '270
16:32:13 5 patents, they don't expire until 2028, almost six years from
16:32:19 6 now. And this is why February 8, 2008 is important, but it's
16:32:23 7 also why a running royalty, not a lump-sum royalty, is
16:32:27 8 appropriate in this case. These patents have legs. They're
16:32:30 9 going to be around for six more years. And if you find that
16:32:33 10 Facebook infringes and they want to keep using the patented
16:32:36 11 invention, well, they'll have to keep paying.

16:32:42 12 And you heard testimony from Facebook's engineers,
16:32:45 13 that they started working on Facebook Live sometime in 2014.
16:32:48 14 And, as Dr. Jeffay testified, because it is undisputed that the
16:32:51 15 '557 and '270 patents are entitled to claim priority back to
16:32:56 16 October 19, 2007, both patents are deemed filed on that date.
16:33:01 17 They're deemed filed on that date. This is important.

16:33:05 18 Even though it seems odd that the '270 and the '557
16:33:08 19 patents were filed after Facebook launched its live messaging
16:33:12 20 infrastructure in 2015, under the law, as this Court has
16:33:17 21 instructed you, both patents are deemed to have been filed in
16:33:20 22 2007. That means, even though the patents technically had not
16:33:24 23 been filed and even if Facebook did not know about them, they
16:33:27 24 still owe a royalty if you find infringement.

16:33:30 25 You might question, is that fair? Well, as this

16:33:35 1 Court instructed you, patent infringement is what is called a
16:33:38 2 strict liability offense. In both tort and criminal law,
16:33:43 3 strict liability exists when a defendant liable for committing
16:33:46 4 an action regardless of what his or her intent or mental state
16:33:51 5 was when committing the action.

16:33:54 6 An example, selling alcohol to a minor, that's a
16:33:58 7 strict liability offense. Speeding is another one. Whether
16:34:01 8 you knew you were speeding or not, you're going to get that
16:34:05 9 ticket.

16:34:07 10 Now, you'll recall that you had to hear from
16:34:10 11 Peter Deng during Facebook's case instead of ours because
16:34:13 12 Facebook had objected. They sure did not want you to hear that
16:34:17 13 they looked at Voxer's patents back in February 2012.

16:34:21 14 MR. VAN NEST: Objection, Your Honor: That's
16:34:22 15 improper argument.

16:34:23 16 THE COURT: Sustained. The jury will disregard the
16:34:25 17 last statement.

16:34:26 18 MR. POWELL: Facebook -- you'll recall the business
16:34:36 19 discussions between Facebook and Voxer. Facebook wanted you to
16:34:39 20 believe that they simply determined they didn't need Voxer's
16:34:42 21 walkie-talkie voice messaging app, so they cut off discussions.

16:34:47 22 Well, we know that's not the case. They cut off
16:34:50 23 discussions with Voxer because Facebook determined Voxer's
16:34:53 24 technology was not only core, it was patented. And after
16:34:56 25 looking at its first issued patent, they realized Voxer had

16:35:00 1 patented Facebook's future.

16:35:01 2 Voxer asks that you, ladies and gentlemen of the
16:35:03 3 jury, send Facebook a message. You may get -- they may get to
16:35:07 4 read our e-mails and intercept our videos, but they can't walk
16:35:12 5 all over somebody's United States patent rights without being
16:35:15 6 held accountable.

16:35:16 7 Just as Mr. Katis fought as a soldier for our right
16:35:19 8 to free speech, Voxer now asks you and each of you to fight as
16:35:23 9 a juror for its property right and find that Facebook has
16:35:25 10 infringed both patents. Hold them accountable. Facebook did
16:35:30 11 not just take Voxer's technology and trample on its patents.
16:35:33 12 They stole its future.

16:35:36 13 I urge you, ladies and gentlemen, please give
16:35:38 14 Matt Ranney and the other former Voxer employees their future
16:35:42 15 back. Find Facebook and Instagram have infringed the '270 and
16:35:46 16 '557 patents, find Facebook has failed to overcome the
16:35:51 17 presumption of validity on the '557 patent, and award Voxer the
16:35:56 18 \$175 million reasonable royalty it has proven it is entitled
16:36:01 19 to.

16:36:01 20 For myself, my client, its founders, Mr. Katis,
16:36:07 21 Mr. Ranney, the Panttajas, for all of the Voxer employees and
16:36:12 22 their families, sincerely, we thank you for your time and
16:36:15 23 consideration.

16:36:17 24 THE COURT: Ladies and gentlemen of the jury, you've
16:36:20 25 now heard the entire case, including the closing arguments, and

16:36:24 1 the case will pass into your hands.

16:36:27 2 So let me give you a few instructions. You may only
16:36:30 3 talk about this case when all eight of you are present together
16:36:35 4 in your jury room. You can't break up into small groups and
16:36:38 5 discuss it. Or if you were to take a luncheon break or evening
16:36:42 6 break or something like that, you can't discuss it in small
16:36:44 7 groups. You can only discuss the case when you're all present
16:36:48 8 in your jury room.

16:36:51 9 Up until this point, I pretty much controlled your
16:36:54 10 time. But now the case passes into your hands, as does your
16:36:59 11 time. You can deliberate when you want to deliberate. For
16:37:04 12 instance, it's a little after 4:30 today. If you want to
16:37:08 13 deliberate some into the evening, you may, but you do not have
16:37:11 14 to. You can come back in the morning if you would rather do
16:37:15 15 that.

16:37:16 16 What I ask you to do is, when you recess, I want you
16:37:22 17 to do two things for me, and that is to select your presiding
16:37:28 18 juror and let us know who that is, and then determine what your
16:37:34 19 initial work schedule's going to be. If you're going to stay
16:37:38 20 here a while tonight and then come back at a certain time
16:37:40 21 tomorrow, tell me that. And you'll do this through the note
16:37:44 22 process that we've talked about. If you just want to select
16:37:48 23 the presiding juror and recess for the evening and come back
16:37:51 24 tomorrow and start your deliberations you may do that.

16:37:55 25 You can come back as early or as late as you want to.

16:37:59 1 I will ask you -- or I would like you during the day, as you're
16:38:03 2 deliberating tomorrow, that from time to time let me know when
16:38:07 3 you're going to have a lunch break or when you're going to
16:38:10 4 recess later, depending on how long your deliberations take,
16:38:14 5 because the lawyers are going to be interested in what you're
16:38:17 6 doing and when you're going to be doing it. I'm going to be
16:38:20 7 interested in that because I have other things to do. So we
16:38:23 8 just need to kind of keep track of what schedule we're on. But
16:38:27 9 what that schedule is solely yours.

16:38:29 10 So, remember the instructions that I've given you now
16:38:34 11 and what the written instructions are. And you're excused to
16:38:40 12 commence your work as a jury.

16:38:42 13 (Jury recessed)

16:39:19 14 THE COURT: What I want from you-all, and you may
16:39:20 15 have already done it or not, Ms. Oakes needs the hot numbers of
16:39:26 16 at least one lawyer from each side who are going to be present
16:39:29 17 if we get a note or if we get a verdict. And one is enough.
16:39:39 18 But if you want more people here during that, that's fine, but
16:39:42 19 they're going to have to hang out together because I'm not
16:39:45 20 going to keep the jury waiting if we get a note or get a
16:39:48 21 verdict while we round up this whole side of the courtroom and
16:39:52 22 round up this whole side of the courtroom. So make sure
16:39:54 23 Ms. Oakes knows what the phones are and where she can get ahold
16:39:59 24 of you.

16:40:00 25 And what we're going to automatically do is send

16:40:05 1 enough copies of the jury charge and the verdict form back to
16:40:08 2 the jury to where they can all have one. And then I'm -- I
16:40:14 3 think they'll take me at my word and let me know the
16:40:16 4 original -- the first schedule and the presiding juror. So if
16:40:21 5 you want to hang around and see what we get from them.

16:40:24 6 I want to thank you-all. It's been a long seven
16:40:27 7 trial days, but I think you've tried a good case. I've enjoyed
16:40:33 8 being with you.

16:40:34 9 MR. VAN NEST: Thank you, Your Honor.

16:40:35 10 MR. STONE: Thank you, Your Honor.

16:40:36 11 MR. VAN NEST: Your Honor, I have one comment and
16:40:38 12 objection I'd like to place in the record, in addition to my
16:40:43 13 thanks, of course.

16:40:44 14 But during Mr. Powell's rebuttal closing, he said
16:40:48 15 Facebook doesn't have patents. Whether Facebook has patents or
16:40:53 16 not is irrelevant. It was improper, highly prejudicial, and I
16:40:59 17 would ask the Court to give a curative instruction to the
16:41:02 18 jurors that, whether Facebook has patents or not is irrelevant
16:41:06 19 to any issue to be resolved in the case. It's not something we
16:41:11 20 even debated. It's not something we even discussed. It's not
16:41:15 21 relevant. It was improper. And I'd ask the court to give a
16:41:19 22 curative instruction that, whether Facebook has patents or not
16:41:22 23 is irrelevant.

16:41:24 24 MR. POWELL: Your Honor, I think we can check the
16:41:25 25 transcript. I believe I said they didn't present any patents

16:41:29 1 during this trial.

16:41:32 2 THE COURT: Well, Ms. Rodriguez, if you can check and
16:41:34 3 see. About when did that occur in the argument?

16:41:37 4 MR. VAN NEST: It happened during the rebuttal here,
16:41:39 5 within the few minutes of the Mr. Powell's conclusion.

16:41:42 6 While we're waiting to hear what we're going to hear,
16:41:45 7 let's see what we can find.

16:51:25 8 THE COURT: Your presiding juror is Deborah
16:51:28 9 Lancaster, who was the woman that sat on the end of the front
16:51:30 10 row here throughout the trial. They are breaking for the
16:51:34 11 evening. They'll be back at 9:00. They're going to lunch
16:51:38 12 between 12:00 and 1:00. They've even told me what the
16:51:44 13 afternoon and midmorning breaks will be. It would be what
16:51:46 14 we're doing. It would be 10:30 and 3:30. That's even more
16:51:49 15 information than I wanted from them. I just care when they're
16:51:49 16 going to be in the courthouse. And an evening recess is to be
16:51:54 17 determined.

16:51:54 18 So nothing's going to happen to you before
16:51:58 19 nine o'clock in the morning or a little bit thereafter.

16:52:01 20 MR. VAN NEST: Your Honor, we found the passage in
16:52:03 21 the closing in which counsel told jurors that Facebook hasn't
16:52:12 22 presented any patents. You didn't see any patents on their
16:52:17 23 live streaming system. Or court reporter could read the Q and
16:52:25 24 A. But, obviously, not --

16:52:29 25 THE COURT: Well, it's not going to be Q an A.

16:52:32 1 There's only --

16:52:32 2 MR. VAN NEST: It's A. It's only A.

16:52:34 3 MR. POWELL: Just so the Court's aware, Facebook
16:52:35 4 has 62 patents on their exhibit list, so they could have tried
16:52:39 5 to introduced them in this trial. They chose not to. I think
16:52:42 6 it's a relevant point to make to the jury. They had an
16:52:45 7 opportunity to present, just like they had an opportunity to
16:52:47 8 present additional prior art. They chose not to. It's their
16:52:50 9 choice. I can tell the jury what happened, what they didn't
16:52:52 10 see.

16:52:53 11 I just -- I was very careful not to say they don't
16:52:56 12 have patents on this system. I knew better than to say that.
16:53:00 13 But to tell the jury they haven't seen any in this proceeding,
16:53:02 14 I think that's fair game.

16:53:03 15 MR. VAN NEST: It's not. We stipulated -- they made
16:53:06 16 a motion in limine to exclude it, and we stipulated to it, and
16:53:10 17 it was out of the case. And it wasn't relevant to anything.
16:53:14 18 They asked us not to present it, and we agreed. And now he's
16:53:18 19 told the jury that there's something significant about the fact
16:53:22 20 that they didn't see any Facebook patents on our live streaming
16:53:27 21 system and that we didn't present any. Well, they're the ones
16:53:31 22 that moved to exclude it, and we stipulated to it.

16:53:34 23 MR. POWELL: We did not stipulate. That's not true,
16:53:36 24 Your Honor. They withdrew it. That's it. There's no
16:53:39 25 agreement. There's no stipulation. Not that I'm aware of.

16:53:44 1 THE COURT: Well, you know it better than I know it,
16:53:46 2 because I wasn't in any of the discussions.

16:53:48 3 MR. POWELL: I mean, if they want to try and argue we
16:53:50 4 agreed, we can take a look at that. I'm not aware of any
16:53:53 5 agreement on that ground. We all withdrew our motions in light
16:53:56 6 of Your Honor's comments.

16:53:57 7 THE COURT: Here's what I want you to do.

16:54:00 8 Ms. Rodriguez will give you, if you need it, copy of
16:54:05 9 what exactly was said. The jury is going home. Mr. Van Nest,
16:54:11 10 prepare for me no argument -- listen to me -- just on paper
16:54:15 11 exactly what curative instruction you would have me give the
16:54:18 12 jury. And you-all both look through your records and your
16:54:22 13 files and see if there was a stipulation or discussion and what
16:54:25 14 have you, and we can talk about it -- give me a time in the
16:54:31 15 morning when you want to talk about it.

16:54:33 16 MR. VAN NEST: Nine o'clock.

16:54:34 17 THE COURT: I'll be here at 9:00.

16:54:36 18 MR. POWELL: I'm fine with 9:00, Your Honor.

16:54:37 19 THE COURT: Okay. We'll talk about it at 9:00, and
16:54:39 20 I'll decide if I'm going to give a curative instruction.

16:54:42 21 MR. VAN NEST: Thank you, Your Honor.

16:54:42 22 MR. POWELL: That works for the plaintiff. Thank
16:54:43 23 you.

16:54:47 24 THE COURT: All right. Thank you-all.

16:54:51 25 (End of transcript)

1 UNITED STATES DISTRICT COURT)

2 WESTERN DISTRICT OF TEXAS)

3 I, Arlinda Rodriguez, Official Court Reporter, United
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